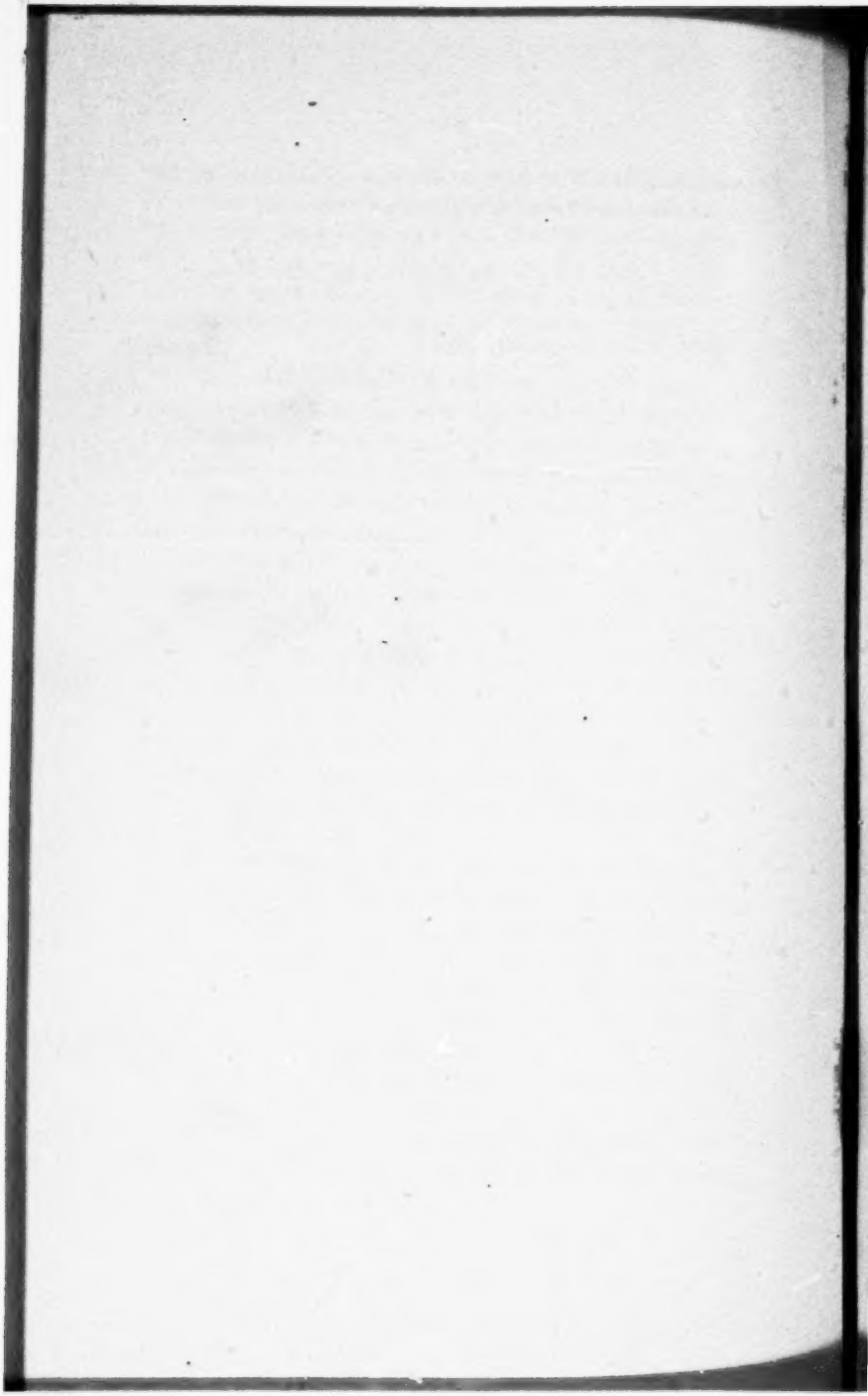

No. 181.

Brf. of Sterry, Kenna & Dunlap

Office Supreme Court U. S.
FILED
OCT 22 1901
JAMES H. McKENNEY

For Appellants

IN THE

Supreme Court of the United States.

Filed Oct. 22, 1901.

OCTOBER TERM, A. D. 1901.

No. ~~400~~ 181.

THE UNITED STATES TRUST COMPANY OF NEW YORK and C. W. SMITH,
Appellants,
vs
THE TERRITORY OF NEW MEXICO,
Appellee.

BRIEF OF APPELLANTS.

C. N. STERRY,
SOLICITOR FOR APPELLANTS.

E. D. KENNA,
ROBERT DUNLAP.
OF COUNSEL.

The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 460.

THE UNITED STATES TRUST COMPANY OF NEW YORK and C. W. SMITH, *Appellants,*

vs

THE TERRITORY OF NEW MEXICO, *Appellee.*

STATEMENT.

Statement of the case prior to its reinstatement in the court below.

While this case has previously been before this court, upon an appeal by the Territory of New Mexico (172 U. S., 171; 174 U. S., 543), none of the questions presented by the present appeal were involved in such prior appeal, and, therefore, were neither presented to nor considered by this court upon its former hearing of the case. The present record discloses the following facts:

The Atlantic and Pacific Railroad Company was incorporated by the Act of Congress approved July 27, 1866 (14 U. S. Stats., p. 292); subsequently, in 1879 and 1880,

that company constructed that portion of its railroad which ran from Isleta Junction, in the Territory of New Mexico, to the west bank of the Colorado river, in the Territory of Arizona, along the line fixed by its charter, a distance of about five hundred and seventy (570) miles. This part of its railroad was located and constructed through a portion of only two counties in New Mexico, to-wit, Bernalillo and Valencia. The total distance of the line in the two counties being about one hundred and seventy-four (174) miles, ninety-two (92) miles of which was in the County of Valenica, and the balance in the County of Bernalillo.

This company, in 1882, leased from the Southern Pacific Railroad Company a line running from a connection with its road at the west bank of the Colorado river to Mojave, in the State of California, a distance of some two hundred and forty-two (242) miles, and thereafterwards operated its line, and this leased line, as one line of railroad, from Albuquerque to Mojave. This line of railroad, and all the property of the company connected therewith, was known and called the Western Division of the Atlantic and Pacific Railroad Company.

In January, 1894, the Mercantile Trust Company of New York (being the trustee in a second mortgage given by the Atlantic and Pacific Railroad Company on all of its property pertaining to this western division, to secure bonds to the amount of $5,000,000) commenced four actions to foreclose its mortgage; one in the District Court of the Second Judicial District of the Territory of New Mexico (this being the district within which all the railroad and other property of the company in the Territory of New Mexico was situated); one in the District Court of the Fourth Judicial District of the Territory of Arizona

(this being the district in which all the line of the road and other property of the company in Arizona was situated); one in the United States Circuit Court for the Southern District of California (that being the district in California in which it was operating a railroad); and the other in the Circuit Court of the United States for the Northern District of California. The railroad company was the sole defendant in each of these actions; and it having entered its appearance in each action, each court wherein these actions were pending, upon application by the trust company and notice to the defendant, appointed three receivers to take possessoin of and operate the property which was covered by the mortgage sought to be foreclosed. These receivers (being the same persons in each jurisdiction), having qualified, took actual possession early in January, 1894, of all the line of railroad mentioned, and all the other property belonging to the railroad company in each of the jurisdictions named, and continued in possession of the same, operating the railroad, until the first of February, 1896. In January, 1896, the United States Trust Company of New York, the trustee in the first mortgage executed by the Atlantic and Pacific Railroad Company (under the act of Congress approved April 20, 1871; 17 U. S. Stats., p. 19) upon all of its property (pertaining to the western division), to secure the sum of $16,000,000 in bonds, commenced a suit to foreclose its mortgage, in each one of the courts above mentioned.

In the actions commenced by the United States Trust Company, the railroad company, the Mercantile Trust Company and the receivers appointed in the actions commenced by the last named company, and others, were made parties defendant. In these last actions, each of the courts wherein the same were pending appointed C. W. Smith receiver, to

take possession of all the property belonging to the railroad company, which was then in the possession of the receivers appointed in the actions commenced by the Mercantile Trust Company, and ordered the receivers in the Mercantile Trust Company case to turn the property in their custody over to Mr. Smith, on or before February 1, 1896, subject to the liabilities and obligations incurred by them as receivers. These orders practically extended the former receivership to these last cases, substituting Mr. Smith for the other receivers, who resigned after delivering the property in their custody to Mr. Smith. The defendants having been served, or appearing in the cases, a hearing was had, and a final decree entered in each case, in favor of the plaintiff, the United States Trust Company, and against the other defendants. The final decree entered in the District Court of New Mexico was entered on April 10, 1896, and subsequently the same decree was entered in each of the other courts; the New Mexico court being treated by each of the other courts as the court of primary jurisdiction. The decree entered in the District Court of New Mexico provided, among other things, that all the property pertaining to the western division of said railroad company, including the franchise, should be sold at public auction, upon certain terms and conditions, stated in the decree. On the third day of May, 1897, in accordance with the terms of the decree entered in that court, the special master named in the decree sold all of the property decreed to be sold to A. F. Walker, R. Somers Hayes and Victor Morawetz; on May 4, 1897, this sale was confirmed in the New Mexico court; subsequently, in May, 1897, the sale was confirmed in each of the other courts. On June 2, 1897, in accordance with the terms of the final decree and the decere of confirmation entered in each court, the special

master executed and delivered a deed conveying to the purchasers all the property sold. On June 22, 1897, the grantees in the special master's deed conveyed all the property sold and conveyed to them to the Santa Fe Pacific Railroad Company, a corporation created under the act of Congress, approved March 3, 1897. (29 U. S. Stats., p. 622.)

On June 10, 1897, after the sale, confirmation and conveyance by the special master to the purchasers, the so-called intervening petition under consideration was, without notice to any of the parties or the purchasers, but by leave of court, filed in the action commenced by the United States Trust Company in the District Court of the Second Judicial District in New Mexico. This intervening petition prayed for an order upon the receiver to pay certain taxes claimed to be due Valencia County, New Mexico, alleged to have been levied upon the right of way of the railroad, sold under the decree, and the improvements placed thereon, being the sum of thirteen thousand five hundred and eighty-six dollars and fifty-four cents ($13,586.54), for 1892; twenty-three thousand and sixty-four dollars and sixty-three cents ($23,064.63), for 1893; twenty-three thousand and twenty dollars and sixteen cents ($23,020.16), for 1894; twenty-three thousand and twenty dollars and sixteen cents ($23,020.16), for 1895, and twenty-four thousand two hundred and seventy-two dollars and ninety-two cents ($24,272.92), for 1896.

The intervening petition alleged that these claims for taxes were based upon taxes placed by the collector upon the tax roll of that county for the year 1896, upon a claim of right to do so under the provisions of sections 2847 and 2848 of the Compiled Laws of New Mexico of 1884. (See Appendix.)

The court made an order requiring the United States

Trust Company and the receiver, Mr. Smith, to show cause on or before June 22nd why the prayer of this intervening petition should not be granted. Pursuant to the order of the court the United States Trust Company and the receiver filed their certain joint and several pleas in bar to this intervening petition, and the same were at once set down for argument, but the court refused to hear any argument on the sufficiency of the pleas, and peremptorily dismissed the intervening petition, on its own motion, on the 23rd day of June, 1897. An appeal was taken by the Territory to the Supreme Court of the Territory, where the order dismissing the intervening petition was affirmed. An appeal was then taken to this court, and this court affirmed the order of dismissal (172 U. S., 171), but, on a motion for a rehearing, reversed the order. (174 U. S., 543.) Subsequently, upon a mandate from this court, the Supreme Court of the Territory set aside its judgment and issued a mandate to the District Court, and the District Court, on August 4, 1899, pursuant to the mandate, set aside the order dismissing the intervening petition and reinstated the case upon its docket for hearing. On the former hearing the transcript before this court failed to disclose the final decree, the fact of the sale, the decree of confirmation and other important facts which the entire record of the case at that time actually disclosed.

Statement of the questions presented by the appeal of C. W. Smith, as Receiver, and the United States Trust Company.

In October, 1898, Mr. C. W. Smith, having surrendered in July, 1897, to the assignee of the purchasers, the property sold, made his final accounting as receiver, and was discharged, as such, by the District Court in New Mexico. No other receiver having been appointed as his successor, it appeared upon the record, at the time of the reinstatement of the case, that the court had neither a receiver for or the custody of the property involved or any funds out of which the claims presented could have been satisfied. It also appeared from the record at this time that neither Mr. Smith nor the United States Trust Company had the slightest interest in the property which had formerly been in the custody of the court, through its receivers and receiver, and against which the taxes sought to be recovered were alleged to have been levied. When this case was called for hearing in the District Court of New Mexico, at its September 1899 term (the first term following its reinstatement), C. W. Smith and the United States Trust Company filed a joint and several amended motion to dismiss the intervening petition, upon grounds stated therein; among which were the grounds: that Smith had been discharged as receiver prior to the reinstatement of the case, and had no funds or property in his hands to answer any judgment that might be entered against him, in any official capacity, or otherwise; and that neither he nor the United States Trust Company had, at the time of the filing of the motion, any interest whatever in the subject-matter of the intervening petition; that all of the property concerning which it was sought to have the taxes

claimed declared a lien upon had been sold and conveyed to third parties, and placed in their possession; that no notice, or demand, had ever been made upon the purchasers, or their assignee, as required by the terms of the final decree and the decree of confirmation, for the claims or demands sued for; that the name of the territory was used in the intervening petition without right or authority, and that the intervening petition was unauthorized. This motion was supported by two affidavits, and two affidavits were filed in opposition. The motion was heard, on the day it was filed, and overruled. Each of the facts, stated in the motion to dismiss, as grounds for dismissal, either appeared fully upon the records in the cause, or was established by the affidavits filed. None of the facts stated in the motion were controverted by the affidavits filed in opposition to it. It appeared from the affidavits filed on behalf of the territory, in opposition to this motion, that each of the assessments of the property taxed, and each levy of taxes thereon, was made on June 7, 1897, after the property had been sold and conveyed to the purchasers. On the 27th day of September, 1899, Smith, as receiver, and the United States Trust Company obtained leave of the court, to withdraw their pleas, filed to the intervening petition on the 23rd day of June, 1897 (which appeared in the record when this case was previously here), and to file in lieu thereof a plea in abatement; this plea in abatement was immediately filed, and it set out the same grounds for abating the intervening petition as had been set forth in the motion to dismiss. This plea in abatement was set down for argument, and upon argument was, by the court, held insufficient in law and in equity to abate the matter presented by the intervening petition. The facts which were admitted by setting the

plea in abatement down for argument were, briefly: that Smith, as receiver, was finally discharged as such receiver on the 26th day of April, 1898, and that he, as such receiver, had no funds or property in his hands wherewith to answer any judgment that might be rendered on the intervening petition; that the United States Trust Company, at the time of filing the petition in intervention, had not, and had not since that time, any interest in the subject-matter of the intervening petition; that at the time of the filing of the intervening petition all the property in the hands of the receiver, and in the custody of the court, had been sold and conveyed to third persons, who were not, and had not been made, parties to the intervening petition; that none of the claims or demands stated in the intervening petition had ever been presented to the purchasers of the property that was sold under the decree and which was sought to be charged with the lien of the taxes claimed, and that no notice had ever been given to such purchasers, or their assignee, that any such demand or claim would be filed by the territory in the cause in which the same were filed, and that neither the purchasers nor their assignee had ever refused to pay any claim or demand for any claims stated in the intervening petition, and that the name of the Territory of New Mexico as used in the intervening petition, was used without any right, leave or authority.

Upon the overruling of the plea a joint and several demurrer, both general and specific, was filed by Smith and the trust company to the intervening petition. In this demurrer each claim for each year's taxes was generally and specifically attacked. This demurrer being set down for argument was, upon argument, partially sustained and partially overruled as to each claim; that is to

say, the court held that the intervening petition disclosed on its face that a certain portion of the property upon which the taxes were levied was exempt from taxation, and also held that those portions of the intervening petition seeking to recover penalties could not be sustained. The court overruled the demurrer as to all those portions thereof which attacked the intervening petition, in so far as it disclosed a levy of any taxes in any year upon the superstructure, on that portion of the right of way alleged to have been acquired over lands held in private ownership.

Upon the overruling of the demurrer Mr. Smith and the trust company filed their joint and several pleas in bar to each of the claims for taxes set out in the intervening petition, to which the demurrer had been overruled. While the plea in bar contained matters constituting several distince pleas, it was so drawn upon consent of the territory and leave of the court. This plea, in substance, set out the following facts: That the Atlantic and Pacific Railroad Company, up to January, 1894, and the receivers from that time until 1897, made each year at the proper time therefor returns to the assessor of Valencia County (as required by law) of all the property of the railroad company which it and they admitted was subject to taxation in such county. That in 1892 the returns made by the railroad company described its right of way, railroad and station grounds in this county, but claimed that the same were exempt from taxation under the second section of the Act of Congress of July 27, 1866. That the returns, after the year 1892, omitted the "right of way" and station grounds under the claim of the railroad company and its receivers that the same were exempt from taxation.

During the years 1892 to 1896, inclusive, the assessor of Valencia County at the proper time in each year, while the assessment rolls of the county for such year were in his possession and under his control, duly assessed all of the "right of way" and station grounds of the Atlantic and Pacific Railroad Company in Valencia County, and to such assessment the tax levies made in that county for such year were duly extended upon the current tax rolls in the manner required by law. The railroad company in 1893 and the receivers subsequent to that time refused to pay these taxes levied upon these assessments upon the claim that the entire "right of way" in that county was exempt from taxation. That at the time the collector took the action heretofore stated, each of the tax rolls for each of these years (which were then and had all the time been in his hands) disclosed to him, clearly and unequivocally, that the county assessor each year during the years 1892 to 1896, inclusive, *had assessed the very property claimed by him to have been omitted from the assessment rolls, and that the proper taxes had been extended each year upon the tax rolls against such assessments.*

It was further shown that the collector made these "additional assessments" upon the tax rolls of 1896, on June 7, 1897, at a time when the assessments rolls for 1897 were in the hands of the county assessor for the purpose of placing thereon, not only the property ordinarily to be placed thereon, but also for the purpose of placing thereon by him all property omitted from the assessment rolls of any previous year under the provisions of section 4055, *infra*. That the collector did all of this under the directions of the counsel employed by the county, who had been present at the confirmation of the sale, and who knew that the property had been sold under the final

decree of the court to third parties, and who had actual knowledge of the existing assessments and levies.

These pleas further disclosed that this same collector had been tax collector for Valencia County during each of the years involved, to-wit: from 1892 to 1896, inclusive, and that he had filed an intervening petition in the action pending in the same court on behalf of the Mercantile Trust Company (to foreclose its mortgage) to recover the taxes levied upon the assessment of the "right of way" and station grounds in Valencia County, for the years 1892 and 1893, and that this petition alleged that the assessments for each of these years were properly made, and that the taxes sought to be recovered had been properly levied; that this petition also alleged that a large part of the "right of way" assessed in each of these years was acquired by the railroad company over lands held in private ownership. This plea further disclosed that this intervening petition referred to was still pending and undisposed of in the case wherein it was filed. In other words, the plea disclosed that to the full knowledge of the collector who had attempted to act under the sections of the statute quoted, the very property which he placed upon the tax rolls of 1896 as property omitted from the assessment rolls of 1892 to 1896, inclusive, was upon such assessment rolls duly assessed with the taxes levied in the county extended to the same, upon the tax rolls for at least the years 1892 and 1893.

The plea further alleged the fact of the sale of the property on May 3, 1897, to the third parties named; the confirmation of the sale on the next day; the conveyance of the property by the master to the purchasers, on the 2nd of June following; the transfer of the property by the purchasers to the Santa Fe Pacific Railroad Company on the 22nd of the same month; that the property was de-

livered by Mr. Smith, as receiver, to the Santa Fe Pacific Railroad Company, as the assignee of the purchasers, on July 1, 1897; that no claim or notice was ever made or served upon the purchasers or their assignee of this assessment made on June 7, 1897, or of the levying of these taxes, on such assessments, and that no demand was ever made upon the purchasers or their assignee at any time for the payment of the taxes claimed; that the provisions of the final decree and the decree of confirmation with reference to the collection of claims and taxes against the property sold had not been complied with by the Territory of New Mexico, or for or on its behalf, or on behalf of Valencia County.

These pleas in bar were set down for argument, and upon hearing were held to be insufficient in law and in equity to bar the claims or demands contained in the intervening petition.

Upon the overruling of the plea in bar, the trust company, and Mr. Smith, as receiver, filed a joint and several answer to the intervening petition, which put in issue each of its material allegations. The case was then heard by the District Court, upon an agreed statement of facts made in writing, filed in the cause and made a part of the record. The facts disclosed in the agreed statement of facts were practically the facts set up in the plea in bar, together with a statement of the facts concerning that portion of the right of way which the territory claimed was acquired by the railroad company from private owners. In relation to this part of the right of way, the facts are, that prior to March 12, 1872, the company definitely located its line of road through New Mexico, and filed its map of definite location with the secretary of the interior on the 12th day of March, 1872, showing its line as located in the territory.

At the time of the definite location of this line none of the lands in Valencia County had been surveyed by the government or anyone else. The line, as located through that county, was upon land which consisted of high desert tablelands, hills and one or two small valleys; none of the land upon which the right of way was located passed over any cultivated, enclosed or occupied land in this county, except some small tracts cultivated by the Indians in the pueblos of Laguna and Acoma; that the railroad was finally built upon this line, as located, in 1879, and that at the time of the location of the line and the building of the railroad there was nothing, so far as the eye could see, from any part of the right of way to distinguish the land over which the right of way was located from any other wild, uninclosed, uncultivated, uninhabited and unsurveyed lands, except where it passed across the two pueblos referred to. On May 8, 1872, the commissioner of the general land office directed the register and receiver of the local land office at Santa Fe, New Mexico, to withdraw the entire amount of the ground granted to the Atlantic and Pacific Railroad Company along the line of its located road through the Territory of New Mexico; that immediately upon receipt of such letter all the lands on either side of the located line of railroad for a distance of forty miles were withdrawn by the local officers. At the time of the location of the line, and the building of the railroad, none of the officers of the railroad company had actual knowledge that the line of road, as located, was located upon any other than public lands belonging to the United States government; that none of the right of way in Valencia County was acquired by the railroad company, either by purchase, donation or condemnation, as the entire right of way was always claimed by the railroad company to have been acquired by the

grant contained in the second section of the Act of July 27, 1866. The agreed statement of facts further disclosed that fifty-five and one-half miles of the railroad crossed alleged Mexican grants, which, at the time of the location and building of the road, had not been segregated from the public lands of the United States by any survey or any other act; that each of these grants (except one of the Indian pueblos referred to) were established by the parties in actions brought against the government, in the Court of Private Land Claims, after the location and building of the road, the history of each grant being set out. Two of these grants were unheard of and unknown, even to the owners, until long after the assessment and levy of taxes in controversy. Prior to the decision of the Court of Private Land Claims, no one could have told where any of the boundary lines of the lands of any one of these grants were, and none of the officers of the railroad company, prior to the location and building of the road, had any actual or constructive knowledge of the fact that the right of way was over any of these grants. Thirteen miles of the right of way was over an alleged Spanish grant, known as the Antonio Sedillo, or Canada de los Apaches, grant. When this grant was confirmed in 1892 by the Court of Private Land Claims, the decree of confirmation provided that the station grounds of the Atlantic and Pacific Railroad Company, and its right of way two hundred feet in width, were excepted from the effect and operation of the confirmation, yet the court below, and the Supreme Court, in determining the amount of the right of way acquired from private ownership by the railroad company, included this thirteen miles. Upon the final hearing before the District Court, the District Court determined that taxes which had been sued for should be

paid upon fifty-five and one-half miles (with the improvements) of the right of way of the railroad of the Atlantic and Pacific Railroad Company. It was adjudged in the decree entered that the Territory of New Mexico should have and recover from the *owners* of this fifty-five miles of railroad the sum of seventy-four thousand one hundred and sixty-eight dollers and seventy cents ($74,168.70), together with the costs expended, and that such amount should be decreed to be a lien upon that portion of the railroad which constituted this fifty-five miles, and which was described in the decree. Mr. Smith, as receiver, and the United States Trust Company, were granted an appeal in open court to the Supreme Court of the territory. The Territory of New Mexico also took an appeal from this decree. These cases were heard by the Supreme Court of the territory together. The Supreme Court of the territory modified the judgment of the court below to the extent of making the amount of the recovery the sum of sixty-one thousand nine hundred and twenty-two dollars and seventy-three cents ($61,922.73), with interest from October 5, 1899, until paid, and rendered a judgment for that amount against the owners of the railroad, the judgment alleging that the Santa Fe Pacific Railroad Company was the owner of it. Otherwise the decree in the lower court was affirmed. From this decree, each party has appealed to this court.

The facts concerning the alleged Spanish and Mexican grants will be hereafter more fully set out in the argument on each one.

ASSIGNMENT OF ERRORS.

The appellees above named, jointly and severally, specify the following as the errors which they and each of them intend to rely upon in this court upon their joint and several appeal from the judgment heretofore rendered by the Supreme Court of the Territory of New Mexico in said case:

I.

The District Court of New Mexico erred in overruling the motion filed in that court September 27, 1899, by the said C. W. Smith, as late receiver, and the United States Trust Company, to dismiss said intervening petition.

II.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court last above referred to and in refusing to sustain the motion to dismiss said intervening petition.

III.

The District Court of New Mexico erred in holding the plea in abatement, filed on the 27th day of September, 1899, by C. W. Smith and the United States Trust Company, to the intervening petition, insufficient, and in overruling the same.

IV.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court, holding that the plea in abatement filed on the 27th of September, 1899, by C. W. Smith and the United States Trust Company, to the intervening petition of appellant, was insufficient, and the Supreme Court erred in not sustaining such plea in abatement.

V.

The District Court of New Mexico erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550) for the year 1892, by the collector of Valencia County, on the tax rolls for the year 1896; and erred in the overruling of each and every portion of said demurrer which was overruled, and erred as to each and every ground alleged therein in support thereof.

VI.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550) for the year 1892, by the collector of Valencia County, on the tax rolls for the year 1896; and the Supreme Court erred in not sustaining such joint and several demurrer to that portion of the intervening petition last above referred to.

VII.

The District Court of New Mexico erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550) for the year 1893, by the collector of Valencia County, on the tax rolls for the year 1896; and erred in the overruling of each and every portion of said demurrer which was overruled, and erred as to each and every ground alleged therein in support thereof.

VIII.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court in overruling the joint and several demurrer of the appellees to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550) for the year 1893, by the collector of Valencia County, on the tax rolls for the year 1896; and the Supreme Court erred in overruling the said joint and several demurrer to said portion of said intervening petition.

IX.

The District Court of New Mexico erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550) for the year 1894, by the col-

lector of Valencia County, on the tax rolls for the year 1896; and erred in the overruling of each and every portion of said demurrer which was overruled, and erred as to each and every ground alleged therein in support thereof.

X.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550) for the year 1894, by the collector of Valenica County, on the tax rolls for the year 1896; and the Supreme Court erred in refusing to sustain such demurrer to such portion of said intervening petition.

XI.

The District Court of New Mexico erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550), for the year 1895, by the collector of Valencia County on the tax rolls for the year 1896, and erred in the overruling of each and portion of said demurrer which was oyerruled, and erred as to each and every ground alleged therein in support thereof.

XII.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550) for the year 1895, by the collector of Valencia County on the tax rolls for the year 1896; and the Supreme Court of New Mexico erred in refusing to sustain such demurrer to that portion of said intervening petition.

XIII.

The District Court of New Mexico erred in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550), for the year 1896, by the collector of Valencia County on the tax rolls for the year 1896; and erred in the overruling of each and every portion of said demurrer which was overruled, and erred as to each and every ground alleged therein in support thereof.

XIV.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court in overruling the demurrer to that portion of the intervening petition which alleged certain property to have been assessed at the sum of three hundred and ninety-four thousand five hundred and fifty dollars ($394,550), for the year 1896, by the collector

of Valencia County on the tax rolls for the year 1896; and the Supreme Court of New Mexico erred in overruling the demurrer to that portion of said intervening petition.

XV.

That the District Court of New Mexico erred in overruling the said demurrer, and each and every part thereof, to the extent the same was overruled; and also erred in the ruling upon each proposition contained in the said demurrer which was by the court overruled.

XVI.

The Supreme Court of New Mexico erred in affirming the ruling of the District Court in overruling the said demurrer and each and every part thereof to the extent that the same was overruled; and erred in refusing to sustain said demurrer and each and every part thereof to the intervening petition.

XVII.

That the District Court of New Mexico erred in holding the plea in bar filed by said parties in said cause insufficient and in overruling the same.

XVIII.

The Supreme Court of the Territory of New Mexico erred in affirming the judgment of the District Court in holding the plea in bar filed by the appellees in said cause

insufficient, and in overruling the same; and the Supreme Court erred in holding said plea in bar to the intervening petition to be insufficient and in overruling the same.

XIX.

That the District Court of New Mexico erred in holding that the right of way of the Atlantic and Pacific Railroad Company through each of the two Spanish grants known as the Joaquin Sedillo and Antonio Gutierrez, or either of them, was not right of way through public lands at the time it was acquired, and in holding that such right of way was not exempt from taxation.

XX.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court, holding that the right of way of the Atlantic and Pacific Railroad Company where it crossed the two Spanish grants known as the Joaquin Sedillo and Antonio Gutierrez, or either of them, was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands at the time it was acquired, and in not holding that such right of way was not exempt from taxation; and the said Supreme Court erred in holding that the right of way of the Atlantic and Pacific Railroad Company where it crossed the two Spanish grants known as the Joaquin Sedillo and Antonio Gutierrez, or either of them, was not exempt from taxation under the facts disclosed by the agreed statement of facts.

XXI.

The District Court of New Mexico erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the San Clemente grant, or right of way acquired by the Atlantic and Pacific Railroad Company, over what was as to it public lands, and that it was not exempt from taxation.

XXII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court, holding that the right of way of the Atlantic and Pacific Railroad Company, as it crosses the San Clemente grant, was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and holding that it was not exempt from taxation; and the said Supreme Court erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the San Clemente grant was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and that it was not exempt from taxation.

XXIII.

The District Court of New Mexico erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Nicholas Duran de Chaves was not right of way acquired over public lands and was not exempt from taxation.

XXIV.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Nicholas Duran de Chaves was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and holding that it was not exempt from taxation; and the said Supreme Court erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Nicholas Duran de Chaves was not the right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and that it was not exempt from taxation.

XXV.

The District Court of New Mexico erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Antonio Sedillo, was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and was not exempt from taxation.

XXVI.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Antonio Sedillo was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and holding that it

was not exempt from taxation; and the said Supreme Court erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Antonio Sedillo was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and that it was not exempt from taxation.

XXVII.

The District Court of New Mexico erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Laguna Indian pueblo tracts was not right of way acquired over public lands and was not exempt from taxation.

XXVIII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Laguna Indian pueblo tracts was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands and holding that it was not exempt from taxation; and the said Supreme Court erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Laguna Indian pueblo tracts was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and that it was not exempt from taxation.

XXIX.

The District Court of New Mexico erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Pueblo of Laguna was not right of way acquired over public lands and was not exempt from taxation.

XXX.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Pueblo of Laguna was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands and holding that it was not exempt from taxation; and the said Supreme Court erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Pueblo of Laguna was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands and that it was not exempt from taxation.

XXXI.

The District Court of New Mexico erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Pueblo of Acoma was not right of way acquired over public lands and was not exempt from taxation.

XXXII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Pueblo of Acoma was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and holding that it was not exempt from taxation; and the said Supreme Court erred in holding that the right of way of the Atlantic and Pacific Railroad Company as it crossed the grant known as the Pueblo of Acoma was not right of way acquired by the Atlantic and Pacific Railroad Company over public lands, and that it was not exempt from taxation.

XXXIII.

The District Court of New Mexico erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any authority to make any additional assessments upon the tax rolls of 1896 of any property of the Atlantic and Pacific Railroad Company, for any preceding year or years.

XXXIV.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court, holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any authority to make any additional assessments upon the tax rolls of 1896, of any property of the Atlantic and Pacific Railroad Company, for any preceding year or years; and the said Supreme Court erred in holding that Solomon

Luna, as collector of Valencia County, on June 7, 1897, had any authority to make any additional assessments upon the tax rolls of 1896, of any property of the Atlantic and Pacific Railroad Company, for any preceding year or years.

XXXV.

The District Court of New Mexico erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1892, and to extend any levy of taxes against any such assessment.

XXXVI.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court, holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1892, and to extend any levy of taxes against any such assessment; and the said Supreme Court erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1892, and to extend any levy of taxes against any such assessment.

XXXVII.

The District Court of New Mexico erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1893, and to extend any levy of taxes against any such assessment.

XXXVIII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court, holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1893, and to extend any levy of taxes against any such assessment; and the said Supreme Court erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1893, and to extend any levy of taxes against any such assessment.

XXXIX.

The District Court of New Mexico erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1894, and to extend any levy of taxes against any such assessment.

XL.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court, holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1894, and to extend any levy of taxes against any such assessment; and the said Supreme Court erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1894, and to extend any levy of taxes against any such assessment.

XLI.

The District Court of New Mexico erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1895, and to extend any levy of taxes against any such assessment.

XLII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1895, and to extend any levy of

taxes against any such assessment; and the said Supreme Court erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1895, and to extend any levy of taxes against any such assessment.

XLIII.

The District Court of New Mexico erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1896, and to extend any levy of taxes against any such assessment.

XLIV.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1896, and to extend any levy of taxes against any such assessment; and the said Supreme Court erred in holding that Solomon Luna, as collector of Valencia County, on June 7, 1897, had any right or authority to extend upon the tax rolls of 1896 an assessment of any property of the Atlantic and Pacific Railroad Company for 1896, and to extend any levy of taxes against any such assessment.

XLV.

The District Court of New Mexico erred in holding that any interest should be charged prior to December, 1897, upon any taxes found to be due for any year.

XLVI.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that any interest should be charged prior to December, 1897, upon any taxes found to be due for any year; and the said Supreme Court erred in holding that any interest should be charged prior to December, 1897, upon any taxes found to be due for any year.

XLVII.

The District Court of New Mexico erred in holding that F. W. Clancy had sufficient authority to authorize him to file the intervening petition in the name of, and for, and on behalf of, the Territory of New Mexico.

XLVIII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court holding that F. W. Clancy had sufficient authority to authorize him to file the intervening petition in the name of, and for, and on behalf of the Territory of New Mexico; and the said Supreme Court erred in holding that F. W. Clancy had sufficient authority to authorize him to file the intervening petition in the name of, and for, and on behalf of, the Territory of New Mexico.

XLIX.

The District Court of New Mexico erred in holding and determining the issues joined by the answer to the intervening petition of the territory against the said C. W. Smith and the United States Trust Company.

L.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in holding and determining the issues joined by the answer to the intervening petition of the territory against the said C. W. Smith and the United States Trust Company; and the said Supreme Court erred in holding and determining the issues joined by the answer to the intervening petition of the territory against the said C. W. Smith and the United States Trust Company.

LI.

The District Court of New Mexico erred in determining upon the agreed statement of facts that fifty-five and one-half (55½) miles of improvements of the right of way of the railroad formerly the property of the Atlantic and Pacific Railroad Company was assessable, and that the taxes levied upon such improvements upon the assessments made by the collector should be paid.

LII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in determining upon the

agreed statement of facts that fifty-five and one-half (55½) miles of improvements on the right of way of the railroad formerly the property of the Atlantic and Pacific Railroad Company was assessable, and that the taxes levied upon such improvements upon the assessments made by the collector should be paid; and the said Supreme Court erred in determining upon the agreed statement of facts that fifty-five and one-half (55½) miles of improvement on the right of way of the railroad formerly the property of the Atlantic and Pacific Railroad Company was assessable, and that the taxes levied upon such improvements upon the assessments made by the collector should be paid.

LIII.

The District Court of New Mexico erred in determining that the taxes ascertained to be due upon the improvements on the right of way should bear interest from any date prior to the first day of January, 1898.

LIV.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in determining that the taxes ascertained to be due upon the improvements on the right of way should bear interest from any date prior to the first day of January, 1898; and the said Supreme Court erred in determining that the taxes ascertained to be due upon the improvements upon the right of way should bear interest from any date prior to the first day of January, 1898.

LV.

The District Court of New Mexico erred in determining that the amount due as taxes and interest upon the property in controversy on the 5th day of October, 1899, was the sum of seventy-four thousand one hundred and sixty-eight dollars and seventy cents ($74,168.70).

LVI.

The said Supreme Court of New Mexico erred in determining that the amount due as taxes and interest upon the property in controversy on the 5th day of October, 1899, was the sum of sixty-one thousand nine hundred and twenty-two dollars and seventy-three cents ($61,922.73), which it determined should draw interest from that date.

LVII.

The District Court of New Mexico erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1892.

LVIII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1892; and the said Supreme Court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1892.

LIX.

The District Court of New Mexico erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1893.

LX.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1893; and the said Supreme Court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1893.

LXI.

The District Court of New Mexico erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1894.

LXII.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1894; and the said Supreme Court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1894.

LXIII.

The District Court of New Mexico erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1895.

LXIV.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1895; and the said Supreme Court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1895.

LXV.

The District Court of New Mexico erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1896.

LXVI.

The Supreme Court of New Mexico erred in affirming the judgment of the District Court in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1896; and the said Supreme Court erred in determining that any amount of taxes were due upon the property in controversy under the assessment in controversy for the year 1896.

LXVII.

The Supreme Court of New Mexico erred in finding that the collector of taxes for Valencia County "made the additional assessment set up and referred to in the intervening petition of property which had not been theretofore assessed and placed upon the assessment rolls in any way, so that it could be identified, or the validity of the assessment determined," in that such finding was and is contrary to all the evidence, and contrary to the findings of fact made by the Supreme Court, and contrary to the agreed statement of facts adopted by the Supreme Court.

POINTS, ARGUMENT AND AUTHORITIES.

FIRST POINT.

The District Court erred in overruling the amended motion to dismiss the intervening petition of the Territory of New Mexico, and the Supreme Court of the territory erred in affirming such ruling.

This cause was reinstated upon the docket of the District Court upon the mandate of the Supreme Court of New Mexico, on August 4, 1899. (Tr., p. 105.) On the 27th of September following, C. W. Smith, as former receiver, and the United States Trust Company, filed a joint and several amended motion to dismiss the intervening petition, upon the several grounds therein stated, as follows:

"1st. That the receiver, C. W. Smith, was, on or about the 26th day of April, 1898, discharged as receiver in said cause, and from that time to this the said receiver has had no funds or property in his hands where with to answer any judgment that might be rendered against him as such receiver.

2nd. That it appears from the files in the above entitled cause that at the time of the filing of the intervening petition herein all of the property in the hands of the receiver and in the custody of the court had been sold and conveyed to third parties under the decree of this court, who were not, and have not been made, parties hereto.

3rd. That the claims and demands set forth and stated in the intervening petition filed herein were never presented to the parties who purchased the property sold under the decree of foreclosure in this cause, or their assigns, and that no notice was ever given to such purchasers or their assigns that any such claims or demands would be filed by the Territory of New Mexico in this cause, prior to the filing of the intervening petition herein, and neither

said purchasers nor their assigns ever refused any payment thereof upon any demand or otherwise.

4th. That the United States Trust Company at the time of the filing of the said interplea had not and never since has had any interest in the subject-matter of this intervening petition, as fully appears from the records and files in this cause.

5th. That the name of the Territory of New Mexico as used in the intervening petition is without any right, leave or authority on the part of the party using the same.

6th. That no suit or intervening petition was ever authorized by any person or persons authorized to use the name of the Territory of New Mexico." (Tr., p. 107.)

Facts Upon Which This Motion Was Based.

This motion was based upon the record in the cause in which the intervening petition was filed, and upon the facts shown by two affidavits of Mr. Sterry (Tr., pp. 108–115), and two affidavits made by Mr. Clancy (Tr., pp. 117–196). The motion was heard by the court, and on the 27th of September, 1899, was overruled. (Tr., fol. 221, p. 126.)

The facts appearing upon the record in the cause in which the intervening petition was filed, and from the affidavits which were before the court, were in substance as follows:

On April 10, 1896, the final decree of foreclosure was entered. (Tr., fols. 55–82, pp. 29–44.) The final decree provided, among other things, that upon the sale of the property, the purchaser or purchasers should, as a part of the consideration and purchase price of the property, in addition to the amount bid—

"pay, satisfy and discharge * * * any indebtedness and obligations or liabilities * * * legally contracted or incurred by the receiver before delivery of possession

of the property sold, * * * also any indebtedness and liabilities contracted or incurred by said delendant railroad company in the operation of its railroad prior to the appointment of receivers, which are prior in lien to said first mortgage, and which shall not be paid or satisfied out of the income of the property in the hands of the receiver, upon the court adjudging the same to be prior in lien to said mortgage and directing payment thereof."

It was further provided in this decree that—(the italics are ours)

"in the event that said purchaser or purchasers *shall refuse, after demand made,* to pay any such indebtedness, obligations or liabilities, *the person holding the claim therefor may, upon fifteen days' notice to said purchaser or purchasers, their successor or successors, assign or assigns, file his petition in this court to have such claims enforced against the property aforesaid, in accordance with the usual practice in relation to claims of a similar character;* and such purchaser or purchasers, and his or their successor or successors, assign or assigns, shall have the right to appear and make defense to any claim, debt or demand so sought to be enforced, and either party shall have the right to appeal from any judgment, decree or order made thereon. And jurisdiction of this cause is retained by this court for the purpose of enforcing the foregoing provisions of this decree; and the court reserves the right to retake and resell said property in case the purchaser or purchasers, his or their successors or assigns, shall fail to comply with any order of the court in respect to the payment of such prior indebtedness, obligation or libilities within thirty days after service of a copy of such order." (Tr., pp. 39, 40.)

The final decree of foreclosure was executed on May 4, 1897, by a sale of the property decreed to be sold, to Victor Morawetz, Aldace F. Walker and R. Somers Hays. (Tr., pp. 110–118.) On May 4, 1897, a decree of confirmation was entered in said cause. (Tr., pp. 43–51.) The decree of confirmation contained the same provisions concerning the payments by the purchasers to be made in

addition to the price bid, as part of the purchase price and consideration for the property sold, as were contained in the decree of foreclosure, and in addition thereto it contained the further provision that "any taxes which may finally be adjudged to be a lien upon the property sold under the decree as aforesaid" should also be paid by the purchasers (Tr., p. 47), the main provisions in the decree of confirmation concerning this matter being in the following language:

"It is further ordered, adjudged and decreed that, upon the execution of the deed to be executed and delivered by the special master, as herein ordered, and upon request of the grantees in such deed, the receiver is authorized, directed and required to let the said grantees, their successors and assigns, into possession of the premises conveyed, and the receiver, or any party to this cause, having possession thereof, shall deliver any of the premises sold, which may be in their possession, to such grantees, their successors or assigns, together with any property and income acquired or received by the receiver in the management or operation of the mortgaged premises; subject, nevertheless, to the condition that the court may retake and resell the property in case the purchasers, their successors or assigns, shall fail to pay any balance of the purchase price unpaid or to comply with any order of court with respect to the payment of the prior indebtedness, obligations and liabilities, as provided in said decree of foreclosure and sale, within thirty days after the service of a copy of such order. * * * Jurisdiction of this cause is retained by this court for the purpose of enforcing the provisions of this decree and the terms and conditions of the conveyance of said property and premises; and full power is reserved to the court, notwithstanding such conveyance and delivery of possession, to retake and resell the said property and premises conveyed, if said purchasers, their successors or assigns, shall fail or neglect fully to complete such purchase and comply with all the terms, conditions and provisions of said decree of foreclosure and sale and of this decree, and shall fail to comply with any

order of the court in respect to the payment of such prior indebtedness, obligations or liabilities." (Tr., pp. 49, 50.)

On June 2, 1897, the special master executed to the purchasers a deed of conveyance of the property sold (Tr., pp. 110–119), the form of which had been submitted to the court and approved in the decree of confirmation. (Tr., p. 49.)

On July 1, 1897, upon demand of the purchasers, in accordance with the decree, the receiver surrendered possession of all the property against which the taxes were claimed to have been levied to the Santa Fe Pacific Railroad Company, as assignee of the purchasers, and since the first day of July, 1897, neither the court, or its receiver, has had possession or control of such property, or any part of it, or of any funds or property pertaining to, or belonging to, the Atlantic and Pacific Railroad Company. (Tr., 115.)

While the appeal in this case was pending in this court, and on October 4, 1898, Mr. Smith, having finally accounted, was discharged as receiver, and no successor was ever appointed. (Tr., pp. 104, 325.)

Prior to the entry of the decree of foreclosure, and on March 12, 1896, the Territory of New Mexico had intervened in this cause to recover taxes claimed to have been levied upon an assessment of the right of way of the Atlantic and Pacific Railroad Company, in Bernalillo County, New Mexico, for the years 1893, 1894 and 1895. On June 5, 1896, the District Court held (upon such intervening petition and the issues joined thereon by the receiver and the plaintiff in the bill of complaint) that the territory had a right to recover the taxes sued for. Upon an appeal by the receiver and the complainant in the bill, the United States Trust Company, the Supreme Court of New Mexico,

on the 18th day of December, 1896, reversed the judgment of the District Court, and held that the right of way of the Atlantic and Pacific Railroad Company in Bernalillo County was exempt from taxation. This decision was subsequently affirmed by this court. (172 U. S., 171.)

At the time of the sale and of the confirmation there appeared upon the assessment and tax rolls of Valencia County, New Mexico, for the years 1892 to 1896, inclusive, an assessment of the right of way of the Atlantic and Pacific Railroad Company (being a portion of the property sold) and the taxes which were levied and extended against such assessment. (See Tr., pp. 178, 186, 193, 199, 205.)

At the time of the confirmation of the sale, Mr. Clancy, having been employed by the Counties of Bernalillo and Valencia (under an act of the legislature of the Territory of New Mexico) to collect taxes claimed by each county, appeared before the court for his clients, and, after some controversy, procured the insertion in the decree of confirmation of the clause which required the purchasers to pay, in addition to the price bid and as part of the purchase price, any taxes which should finally be adjudged to be a lien upon the property sold. (See Clancy's affidavit, Tr., pp. 125–127.)

At the time of the confirmation of the sale, the only action of any kind pending for the recovery of any taxes levied upon the assessment of any portion of the right of way of the Atlantic and Pacific Railroad Company in New Mexico was the appeal pending from the decision of the Supreme Court of New Mexico, referred to, which was pending in this court, and which did not include the appeal in this controversy (subsequently taken) heard by this court at the

same time with the other appeal. No action or proceeding of any kind had been commenced to enforce any claim for any taxes in Valencia County, except certain proceedings instituted in the Mercantile Trust Company case by the collector of the county to recover taxes for 1892 and 1893, in 1894. (Tr., pp. 63–71.)

The claims contained in the intervening petition under consideration were never presented to the purchasers; no demand was ever made upon the purchasers for payment of such claims, or either of them; no notice was ever given to the purchasers of the intention on the part of the territory, or anyone else, to file this intervening ptition, as required by the final decree and the decree of confirmation. (Tr., p. 116.)

The intervening petition was filed without notice on June 10, 1897 (Tr., p. 34), as stated, more than a month after the sale of the property had been made and confirmed and eight days after the property had been actually conveyed to the purchasers by the special master. (Tr., p. 110.) The assessment of the property on which the taxes were levied was never made until more than a month after the sale of the property to the purchasers, so that the taxes were never levied, and never became liens upon this property, until June 7, 1897. (See Clancy's affidavit, Tr., p. 119.)

The undisputed facts above recited necessarily abated the proceedings instituted by the territory in the filing of the petition in intervention, and the court, upon the reinstatement of such proceedings, under the mandate of the Supreme Court, should either of its own motion have dismissed said proceedings or should have sustained said motion.

I.

It is apparent, from any reading of the intervening petition in controversy, that the territory, in filing such intervening petition, was attempting to ignore the terms of the decree of foreclosure and the decree of confirmation, and to procure, by order of the court, from the receiver, out of the funds in his possession, the payment of the taxes claimed, in order to avoid any controversy with the purchasers. This petition in intervention alleges in its first clause that certain property of the Atlantic and Pacific Railroad Company was omitted in the assessment of taxable property in Valencia County for the years 1892 to 1896, inclusive, and that the collector of that county placed the same, as omitted property, upon the tax rolls in his hands for the year 1896; then follow allegations as to the action of the collector concerning the assessment of the property on the rolls for 1896 for each omitted year; then comes the 7th clause, followed by the prayer of the petition, reading as follows:

"7. The receiver of the property of the said railroad company, heretofore appointed in this cause, refuses to pay the said taxes, or any part thereof, and disputes the validity of the same, upon the ground that all of the property so listed, valued and assessed as aforesaid is exempt from taxation by virtue of the provisions contained in the second section of an act of Congress, entitled 'An Act granting

lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast,' which became a law on the 27th day of July, 1866; but your petitioner charges that the said exemption from taxation extends only to the right of way granted to said railroad company on each side of its railroad, where it may pass through the public domain, and does not extend to any improvements made upon the said right of way, nor to the said right of way itself where it passes through land not included in the public domain.

Your petitioner therefore prays that the said taxes so levied as aforesaid may be declared by decree of this court to be a lien upon said property of said railroad company, now in the hands of the said receiver, and that the said receiver may be ordered and directed to pay the said taxes, together with the interest thereon, to the collector of taxes in and for said County of Valencia, and that your petitioner may have such other and further relief as equity may require and to your Honor shall seem meet." (Tr., pp. 50–53.)

While the court, in authorizing the filing of this petition, ordered that the parties to the cause should appear and show cause why the prayer of the petition should not be granted, it only ordered copies of the petition and order to be served upon the solicitor of the Mercantile Trust Company, the solicitor of the complainant and the solicitor of the receiver. (Tr., p. 57.) No notice of any kind was either ordered to be given, or was, as a matter of fact, given to the purchasers of the property to whom it had been conveyed eight days prior thereto.

That this petition did not attempt to assert any right under the decree fully appears from the fact that it made no reference whatever to the provisions, or terms, of the decree, and asked no relief under the same. It is well settled that while a petition in intervention need not be formal, but may be brief, yet it should exhibit all the material facts which are relied upon for the specific relief in-

voked, embodying either by a recital or by reference so much of the record in the original suit in which the petition is filed as is essential to show a right to the particular relief demanded by the petition.

Empire Distilling Co. v. *McNulta*, 77 Fed., 703.

Beach's Modern Eq. Pr., Par. 579, and authorities cited.

The statute upon which the right to sue was based required a description of the property to be inserted in such pleading (Sec. 4157 Appendix).

It was evidently treated by the court and all parties to it simply as a proceeding against the receivership and the funds in the hands of the receiver. It could be treated as nothing else, since the intervention was not made under the terms and conditions of the decree, and the petition therefor was utterly silent as to any demands against the purchasers.

Assuming that it was possible for the court to entertain jurisdiction of the application contained in this intervening petition seeking to require the receiver to pay these taxes out of the funds in his hands, such jurisdiction absolutely ended when the court, prior to October, 1898, finally disposed of all the funds in the hands of the receiver, and, on October 4, 1898, discharged him, without the appointment of any successor. When this case was reinstated upon the docket of the District Court (upon the mandate of the Supreme Court of the territory), the District Court, having parted with the possession of the property upon which the taxes were claimed to have been levied; having disposed of all the funds that it ever had possession of in the foreclosure suit, and having finally discharged its receiver

should, of its own motion, have dismissed the intervening petition.

In support of this proposition we quote at length from a decision of the Supreme Court of Mississippi in the case of *Bond* v. *State* (68 Miss., 648), as follows:

"The third plea of the defendant below averred a perfect bar to the further prosecution of the suit against him officially, as receiver, and the demurrer thereto should have been overruled. The appellant had been appointed receiver of the Vicksburg and Meridian Railroad by the Circuit Court of the United States for the Southern District of Mississippi, and was sued as such receiver in this action. After suit instituted, and before plaintiff below filed its amended declaration, the appellant was, by an order of the court appointing him, fully and finally discharged from the receivership, and this discharge from his official trust he sought to avail himself of by his third plea. Manifestly, the suit was instituted to charge the appellant in his official character, and to subject to liability the property of the railroad company held by him by virtue of his representative character. The action is not against the individual, and the purpose was to reach the property of the railroad company in his hands as the representative of the company. The final discharge of the receiver put an end to his official existence, and withdrew from his care and management the road and property of the company. The discharge having terminated the representative character of the receiver, we are at a loss to understand how any judgment could be rendered against him officially that would render liable to its satisfaction any property of the company—property in his hands when suit was brought, but now finally withdrawn from him by the extinction of his official character before his plea was filed. There is no demand against him as an individual, but only as the representative of the railroad company. It seems plain to us that, with the termination of his representative character and the withdrawal of the road and its property from his custody by the order discharging him, no judgment could be rendered against him properly, as the representative of the company, whereby to make its property

chargeable. His official liability ended with his official existence. The third plea disclosed a perfect defense for the receiver. See *Telegraph Co.* v. *Jewett*, 115 N. Y., 166, 21 N. E., 1036; *Woodruff* v. *Jewett*, 115 N. Y., 267, 22 N. E., 156; *Farmers' Loan and Trust Company* v. *Central R. Co*, 2 McCrary, 181, 7 Fed., 537; *Brown* v. *Gay*, 76 Tex., 444, 13 S. W., 472; Beach Rec., Par. 715, 720."

We also quote at length from a decision of the Supreme Court of Texas in the case of *Brown* v. *Gay* (76 Tex., 444):

"The answer showed that the receiver had been discharged, and all the property theretofore in his hands delivered to the railway company, in pursuance of the order of the court that appointed him; and the order directing this to be done declared that it should remain liable in the hands of the company, for such claims as were proper against the receivership. The ruling of the court was that this action might be sustained against the person who was receiver at the time the injury occurred, notwithstanding he had ceased to be the receiver, and to control, or have the right to control, any fund out of which the judgment to be rendered could be paid. The act of March 19, 1889, was not in force when that ruling was made; and its provisions are, therefore, not applicable to this case. The only ground on which it can be held that property belonging to a railway or other corporation, or to an individual, can be subjected to a sale under judgment against a receiver is that he, with reference to the property so controlled by him, and as to the rights growing out of its management, is the representative of the owner. Can it be said that this representative character continues after the court that appointed him has discharged him, and withdrawn from him all control or right to control the property? We think not. Being no longer the representative of the company in any respect, a judgment against him would not bind it or its property. There being no personal liability or fund left in his hands subject to the control of the court that appointed him, a judgment rendered against him as receiver would be fruitless. As said in *Ryan* v. *Hays*, 62 Tex., 47: 'The sole liability of a receiver, except in cases in which he is personally at fault, is official; and when his official character ceases, and the

property through which, alone, his official liability may be discharged, has passed from his hands, in pursuance of the orders of the court that appointed him, and he has been by that court discharged from his trust, then no judgment can be rendered against him; for with the termination of his official existence ends his official liability.' *Railroad Co.* v. *Ormond, id.*, 274; *Davis* v. *Duncan*, 19 Fed. Rep., 477; *Trust Co.* v. *Railroad Co.*, 7 Fed. Rep., 537; *White* v. *Railroad Co.*, 52 Iowa, 97, 2 N. W. Rep., 1016. The plea to which exception was sustained not only stated facts which, if admitted, showed that no judgment could legally be rendered against the receiver, but stated facts which showed that the Texas and Pacific Railway Company should be made the defendant, as did it state facts which, with some additional facts, would entitle appellees to recover if the injuries resulted from facts that would have authorized a judgment against the receiver had he not been discharged. The plea was a suggestion to the court that the action could not longer be continued against the receiver; and, while the facts stated were not such as to abate the action, they were such that the court should have declined to proceed with the case until the company was made a defendant. This, in analogy to other cases in which a defect of parties arises after action brought, is believed to be the correct practice in cases in which a receiver dies or is removed after action brought against him, or by him, or in case a receiver defendant is discharged, and the property in his hands, subject to payment of a judgment to be rendered, is returned by order of court to its owner. *Wilson* v. *Wilson*, 1 Barb. Ch., 592; *Palmer* v. *Murray*, 18 How. Pr., 549; *Searcy* v. *Stubbs*, 12 Ga., 438; *Lehigh Coal and Nav. Co.* v. *Central Ry. Co.*, 42 N. J. Eq., 591, 8 Atl. Rep., 648; *Talmage* v. *Pell*, 9 Paige, 413; *Sheldon* v. *Adams*, 27 How. Pr., 180; Rev. St., arts. 1246–1255. As the case is now presented, the facts alleged in the plea excepted to must be treated as true; and, so treating them, we hold that the court erred in rendering judgment against the receiver. The question which would arise under the receiver's pleadings as to the liability of the company have been considered in other cases. As the proper parties were not before the court to try the merits of the case, we do not now feel that

it is necessary to consider the many assignments of error relating to matters occurring on the trial.

"The receiver was such representative of the company, when the action was brought, as to make it practically, then, an action against the company; and, for this reason, it would not abate when he was discharged, but might be further prosecuted against the company, if substituted for the receiver, who has ceased to represent it."

See, also, upon the same point, *Fordyce* v. *Du Bose* (87 Tex., 78).

A case very much in point (in that the receiver was discharged pending an appeal) is that of the *Texas and Pacific Ry. Co.* v. *Watson et al.*, decided by the Court of Civil Appeals of Texas, and reported in 24 S. W., 952.

We quote at length from the decision of the Court of Appeals of New York in the case of *N. Y. & W. U. Tel. Co. in re.* v. *Jewett* (115 N. Y., 166), as follows:

"In the actions commenced against the Erie Railroad Company, the court had taken into its possession the property of the company, to dispose of, manage and administer it for the benefit of all parties interested therein or having any claims against the same; and the receiver was merely its officer, arm or agent to take possession of the property, and manage and dispose of the same under its direction, and subject to its control. He could at any time be discharged by the court and another receiver appointed; or the property could be taken out of his hands and restored to its owner, or otherwise disposed of under the judgment in the actions in which he was appointed. No creditors having a claim against the railroad company or its property could sue the receiver, or obtain payment out of the property, except by the consent of the court. A creditor desiring payment out of the property in such a case is obliged to apply to the court; and, for the purpose of having the claim adjudicated, it may authorize a suit against the receiver, or it may hear the claim upon a summary application upon affidavits or oral evidence; or, where the claim is disputed, it may order a reference; and, whether

the proceeding be aganist the receiver by action or by a summary application, the purpose is to enable the court to determine whether the claim ought to be paid. Obviously, after the receiver has been discharged, and the property by the action of the court has all been taken out of his hands, there can be no propriety whatever in any further proceedings against him, because thereafter he ceases to represent anyone. He can no longer act for or represent the company or its creditors, or any other person interested in the property; and, manifestly, the court could not thereafter make an order that he should pay a creditor, he no longer having any funds out of which payment could be made. *Trust Co.* v. *Railroad Company*, 2 McCrary, 181; 7 Fed. Rep., 537. It would be a very singular proceeding to permit a creditor to litigate his claim with a person who was formerly a receiver, but who has ceased to be such, and who is not longer the officer or agent of the court, or subject to its control."

See, also:

McNulta v. *Lockridge*, 137 Ill., 281, 282.

Farmers' Loan & Trust Co. v. *Central R. of Iowa*, 7 Fed., 539.

High on Receivers (2nd Ed.), Sec. 398b, and authorities cited.

II.

When the court approved the final account of the receiver and discharged him, there being no fund in the custody of the court to be distributed, it necessarily lost jurisdiction of this intervening petition, since it was beyond its power to satisfy the same out of funds previously disposed of. The only parties served by the intervening petition were no longer affected by it. The funds sought to be reached and appropriated were no longer under the control of the court.

Ordinarily an intervening petition cannot be filed after final judgment or decree, since the court then loses jurisdiction, except to enforce such judgment or decree.

Meadow et al. v. *Goff*, 90 Ky., 540.

11 Encyc. Pl. & Pr., p. 503 and note 5.

Therefore the only jurisdiction which the court retained after confirmation of the sale was to distribute the funds derived therefrom, and such further jurisdiction as it specifically reserved over the purchaser and property sold under and by virtue of the terms of the final decree. As the petition did not seek to enforce the terms of the decree against the purchasers, since no reference was made to the same, and no notice given to the purchasers, as required thereby, it could therefore only be treated as an intervention to reach funds in the hands of the receiver still remaining undisposed of. It was the duty of the intervenor to see that the court did not lose jurisdiction over such funds, for if it did it necessarily would lose jurisdiction to grant relief on the intervening petition.

The District Court acquired no jurisdiction to entertain this petition in intervention for the purpose of enforcing its claims against either the purchasers or the property purchased by reason of the failure of the Territory to first present the claims contained in it to the purchasers for payment, and its failure to give fifteen days' notice to the purchasers of an intention to file such intervening petition in the foreclosure suit, as required by the terms of the decree.

I.

Any unpaid valid taxes levied against an assessment of the property in controversy in the County of Valencia, either before or during the receivership, were, by force of the statute (see section 2849 of the Stats. of New Mexico in the Appendix), a lien upon such property which were not and could not have been divested by the court in the foreclosure case, neither the county nor the territory being parties to such suit. While it is true that during the possession of the property by the receiver, under the orders of the court, the lien of such taxes could not have been enforced against the property itself (*Ex parte Tyler*, 149 U. S., 164), yet, after the sale of the property under the decree, the confirmation of the sale, its conveyance and surrender of its possession to the purchasers, the Territory or the county could have pursued any remedy given by the statutes for the enforcement of such taxes against the property or its owners. So long as the County of Valencia or the Territory of New Mexico had not seen fit to attempt to enforce any claim for taxes (except as the collector acted in the Mercantile Trust Company case), during the time the property was in the custody of the court preceding its sale

and conveyance, their right to enforce any such claims after such sale and conveyance in the foreclosure action was necessarily limited to the mode and manner pointed out by the decree of foreclosure for the enforcement of liabilities against the purchasers which were to be paid by them as a part of the purchase price.

The decree of foreclosure required that the purchasers of the property, at any sale under it, should, in addition to the amount bid, pay as part of the consideration and purchase price all liabilities incurred by the Atlantic and Pacific Railroad Company prior to the receivership which were liens upon the property superior to the lien of the mortgage, and also all liabilities incurred by the receiver. This required, undoubtedly, the payment of such taxes as were valid claims against the property.

San Francisco v. *Jones*, 20 Fed., 188.
San Francisco v. *Luning*, 73 Cal., 610 (15 Pac., 311).
State v. *Mining Co.*, 14 Nev., 226.
State v. *Certain Lands in Redwood County* (S. C. Minn.), 42 N. W., 478.

This requirement in the decree of foreclosure not satisfying the territory, it appeared, through its solicitor, Mr. Clancy, before the court at the time of the confirmation of the sale and procured to be inserted in such decree the specific requirement that the purchasers should pay as part of the purchase price all taxes that might be determined to be a valid lien upon the property. (Tr., pp. 47, 125).

If there had been no requirement in the decrees of the court that the purchasers should pay any valid taxes, the purchasers would have taken the property subject to the lien of any such taxes, but without any personal res-

ponsibility for their payment. Notwithstanding its right, and the right of Valencia County to enforce any valid taxes which were a lien upon the property after its sale and delivery to the purchasers, in any way consistent with the statutes of New Mexico, the territory came into the foreclosure case and asked the court to create for it a right to hold the purchasers *personally* responsible for such taxes, with the right to enforce the collection of them in the action in which the property was sold, in a manner and by a proceeding unknown to the procedure in New Mexico for the collection of taxes. Acquiring the right to collect any valid taxes in a manner different from that known to the statutes of New Mexico, through the reserved jurisdiction of the court in the foreclosure case, the territory was necessarily limited to the proceedure provided by the terms of the decree, when it sought to obtain the benefits of it,

II.

That the purchase of the property upon its sale under the decree of foreclosure, the confirmation of such purchase, and the conveyance of the property to the purchasers, created a contract between the purchasers and the court as to the method and manner in which the unknown liabilities assumed by the purchasers as part of the purchase price were to be enforced, and that the court was powerless to change the terms of such contract without the consent of the purchasers, is, as it seems to us, indisputable.

Kneeland v. *American Loan Co.*, 136 U. S., 89.

Davis v. *Mercantile Trust Co.*, 152 U. S., 594.

As was said by Justice Brewer in delivering the opinion of the court in the case of *Central Trust Co. et al.* v. *Wabash, St. L. & P. R. R. Co. et al.* (30 Fed., 332):

"It is as old as judicial sales, iterated and reiterated with unvarying and emphatic voice, that a purchaser at a judicial sale looks to the judgment or decree for the measure of his rights. He does not look back of the decree to questiions which might have been presented, or might have been differently determined between the litigating parties; he looks to the decree, and upon that alone he rests. That measures his rights. It is his muniment of title, and when he purchases and pays he has a right to say that that is his contract with the court, and no court ever did and no court ever ought to change the contract which it has made, when by its decree solemnly entered it invites persons to buy and upon the faith of that invitation persons do buy and pay."

We quote from the opinion of the court in the case of *Fidelity Ins. T. & S. Co.* v. *Norfolk & W. R. R. Co.* (88 Fed., 820. The italics are ours):

"The claim sought to be established in the state court against the railway company is a liability accruing during the time the receivers were in control and possession of the railroad, *and must be established in the manner prescribed by the decree.* The court did not surrender its jurisdiction over this class of claims, nor did its jurisdiction end with the execution and delivery of the deed of conveyance. It specifically provided in the decree of sale what liabilities the purchaser of the railroad property should assume as part of the purchase price therefor, and how such liabilities should be ascertained. These provisions of the decree entered into and became a part of the contract of purchase. The railway company by its purchase became a party to this suit. It is bound by the terms of the decree of sale, and it has a right to have them enforced in its behalf."

We quote from the opinion of the court in the case of *C. & O. R. R. Co.* v. *McCammon* (C. C. A., 7th Cir.; 61 Fed., 774), as follows:

"The rights and liabilities of a purchaser at a judicial sale are measured by the terms and conditions of the decree. * * * The sale, when confirmed by the court and its conditions met by the purchaser, created, in effect, a contract between the court and the purchaser, and the court could no more impose an additional term or condition upon that contract than could an individual. *Farmers' Loan & Trust Co.* v. *Central R. of Iowa*, 7 Fed., 537; *Davis* v. *Duncan*, 19 Fed., 477."

We quote from the Supreme Court of Texas, in its decision in the case of *Houston & T. C. R. Co.* v. *Crawford* (88 Fed., 277), as follows:

"As a general rule, the purchaser of a railroad at a sale made under an order of a court holding the custody of the property, by a receiver, takes the property free from claims against the receiver arising out of the operation of the road; but the court ordering the sale may impose upon the purchaser liability for such debts, as a part of the consideration of his purchase. *Hicks* v. *Railroad Co.*, 62 Tex., 41; Beach Rec., Par. 735. *A purchaser under such order can only be held liable according to its terms.* In this case the order directing that possession be delivered to the purchaser prescribed that he should take the property subject to the payment of such claims against the receiver as might be established before that court within a given time. This was a condition of liability, and the purchaser cannot be held by virtue of the order alone, except for the claims so ascertained and allowed."

See, also,

C. T. Co. v. *St. L., A. & T. R. R. Co.*, 59 Fed., 385.

Farmers' Loan & Trust Co. v. *Central R. Co. of Iowa*, 7 Fed., 540. (This last case may be considered a leading case on the sobject.)

III.

It must be true that the court lost jurisdiction to proceed any further in such case, except in respect to those matters concerning which it specifically, by the terms of the decree, retained jurisdiction to proceed in the case. Therefore, the court could grant no right to file an intervening petition in the case at the time when this intervening petition was filed, except that the terms and conditions concerning the right reserved in the decree to file such petition were strictly complied with. Neither the County of Valencia nor the Territory of New Mexico were bound by the terms of the decree, except as they attempted to acquire rights through it. Notwithstanding the requirement in the decree of confirmation that the purchasers should pay valid taxes, the county and the territory could have ignored such provision and have proceeded in the courts of the territory to enforce the collection of the taxes against the property in any way authorized by the laws of the territory.

IV.

The learned court below, in answer to the proposition that a demand must first have been made upon the purchasers for the payment of these claims, and then, upon their refusal to pay, a notice of fifteen days given them of the intention to file an intervening petition, say, in substance, that Mr. Sterry, who had been resisting these claims since the first attempt had been made to collect them in the Mercantile Trust Company case, "was employed by the purchasers to attend to any pending or future litigation against the receiver." That service of the inter-

vening petition was made at his office on June 10, 1897, and a letter on the subject mailed to him at Los Angeles, California, on the same day; that on June 23, 1897, he filed pleas to the intervening petition, and that ever since July 1, 1897, he has been in charge of all the legal business of that company in New Mexico. The court then further say:

"We cannot agree to the proposition of the appellants that the parties to whom the railroad was sold should have been made parties to this proceeding, and we know of no way by which, under the petition of intervention, the petitioner could have made them parties. This is a proceeding *in rem*, begun when the property was in the hands of the court, and anyone receiving it from the court took it *cum onere*. In addition to this, the court at the time the order confirming the sale was filed retained jurisdiction of the cause, and reserved full power to retake and sell the property if the purchasers, their successors or assigns, should fail to comply with any order of the court in respect to the payment of prior indebtedness, obligations, or liabilities.

No one was injured by the manner in which the notice was given, and it is evident that all of the parties in interest knew of the proceeding, and that such of them as desired contested the same.

The making of the demand on the purchasers for the payment of these taxes would have been a useless formality for both they and their predecessors and successors have always refused to pay them, and have vigorously fought their collection, and are doing so even at the present moment. If the purchasers of the property had desired to settle these taxes they could have paid the money into court.

Furthermore, as late as December 19, 1898, on motion of the Santa Fe Pacific Railroad Company, an order was made by the court allowing creditors of the receivers or of the Atlantic and Pacific Railroad Company to file their claims with the clerk of the Second Judicial District Court on or before October 23, 1899." (Tr., p. 325.)

The learned court, in the position taken, evidently over-

looked the fact that Mr. Sterry was the attorney for the receivers during the entire receivership (Tr., p. 109), and that, under the terms of the decree of confirmation, the purchasers were required to pay, in addition to the purchase price, the compensation of the receivers' attorneys (Tr., p. 48); that after the purchase the purchasers, instead of employing Mr. Sterry (as stated by the learned court), they paid him a lump sum to attend to such further duties as might be required of him as attorney for the receivers (Tr., p. 287); that the notice which was served upon Mr. Sterry was served upon him as solicitor for the receiver, under the order of the court, and not as attorney for the purchasers. Even had he been employed by the purchasers, as stated by the court, such employment would not have made the purchasers parties to the proceedings.

Stryker v. *Crane*, 123 U. S., 527.
Litchfield v. *Goodenough, Ad.*, 123 U. S., 549.
Wilgus v. *Germain* (C. C. App., 9 Ct.), 72 Fed., 773.
Majors v. *Cowell et al.*, 51 Cal., 479.
Black on Judgments, Vol. 2, Sec. 540.
Andrews v. *National Foundry & Pipe Works* (C. C. App., 7 Ct.), 76 Fed., 166.
Central Baptist Church and Society v. *Manchester*, 17 R. I., 492.
Shroeder v. *Lahrman*, 26 Minn., 87.
Canon River Assn. v. *Rogers*, 42 Minn., 123.
Brady v. *Brady*, 71 Ga., 71
Lounsdale v. *Portland*, 1 Or., 381.

It can hardly be claimed that his employment on the 1st of July afterwards, by the Santa Fe Pacific Railroad Company, as assignee of the purchasers, related back so

as to make a service of notice upon him on June 10th previous, as solicitor for the receiver, a service upon the Santa Fe Pacific Railroad Company, which at that time had no legal existence. Neither the purchasers nor their assignee, the Santa Fe Pacific Railroad Company, were ordered to be served with notice by the court at any time. While it is true that the purchasers took the property from the hands of the court "*cum onere*," only took *cum onere* as to the things disclosed in the record, at the time of the sale, and as to things which might arise in the future, concerning which they were to be affected only in the manner provided by the decree. There is nothing in the record warranting the assertion of the learned court that all parties in interest knew of the proceedings, and that such of them as desired contested the same. The property in controversy was conveyed to the Santa Fe Pacific Railroad Company on the 22d of June, 1897, and possession delivered to it on July 1, 1897. (Tr., p. 115.) On the 23d day of June, 1897, the intervening petition was dismissed, and was not reinstated until September, 1899. (Tr., p. 103.) While it is possible that "the making of a demand on the purchasers for the payment of these taxes would have been a useless formality," yet it was a formality required by the terms of the decree, as a condition precedent to an intervention, which would affect the rights of the purchasers. It is very likely true that in an intervention to enforce a claim, which the purchasers were required by the terms of the decree to pay as a part of the purchase price, a petition in intervention would not mention the purchasers as parties, but would be filed in the cause in which the decree was rendered, the purchasers were to be protected by the requirements of the decree that the person intending to file

such a petition, in such cause, should give fifteen days' notice that such a petition would be filed, thereby giving the purchasers such notice as would enable them to appear, when it was filed, and make any defense that they chose to make, under the right granted to them. Upon such notice, the purchasers themselves would have a right to make themselves parties, or not, to the cause and proceedings as they might choose. The learned court was not warranted from the facts before it in saying that the purchasers of the property pleaded to any order that may have been made prior to the filing of this petition, as prior to the purchase the purchasers and their principal were strangers not only to the record but to any duty or obligation to perform any terms.

The theory of the learned court, that this was a proceeding *in rem*, and hence no notice was required to be given, is one that is not tenable, under the facts or the law established by many decisions of this court. At the time of the reinstatement of this case the court will remember that the District Court had surrendered the possession and control of the property to the assignee of the purchasers, at the request of the purchasers, in accordance with the terms of the two decrees; consequently, the court, at the time of the hearing of the motion to dismiss, had not the possession or custody of the property, neither could it acquire the right to render any judgment upon the intervening petition ordering the sale of the property, to satisfy the claims presented by such petition. The right to sell the property to satisfy any claims presented by the intervening petition was a right that could only come into existence after a determination of the amount due, and a service of the copy of the order of the court, directing the payment of such amount, coupled with a failure to comply with its terms for a period of thirty days on the part of the purchasers or their assigns. (Tr., p. 42.) Assuming, however, for the sake of the argu-

ment, that the intervening petition itself presented such a case as would make it a *quasi* proceeding *in rem*, yet the court ~~would be~~ was powerless to act without giving notice of some kind or character to the purcharers, or to the owner of the property sought to be affected.

This proposition is clearly stated by the Circuit Court of Appeals of the Seventh Circuit in its syllabi in the case of *Hook* v. *Mercantile Trust Company of New York et al.* (95 Fed., 41), as follows:

"Where one not originally a party is permitted to file a petition in a suit in equity, and to set up new and different rights from any involved in the original bill, such petition (at least as against a stranger to the suit, who, during its pendency, and before the filing of the petition, has acquired possession of the property in litigation) must be treated as the commencement of a new suit; and such person must be brought in by process in accordance with the established practice, or he will not be concluded by a decree in favor of the petitioner."

In the leading case of *Farmers' Loan & Trust Co.* v. *Central R. R. Co. of Iowa, supra*, the court said, in a case similar to the one at bar (the italics are ours):

"The proceedings by which the claimant asserts his rights in analogous, at least, to an action *in rem*. Now it is familiar law that, in order to give a court full and complete jurisdiction *in rem, some form of notice must be given to parties whose rights and interests may be affected by the decree;* and where no form of notice is prescribed by law, the court is empowered to direct the notice to be given. This notice is sometimes personal and in some cases by publication, depending upon the situation of the parties. In the present case the new railway company—the Iowa Central Railway Company—is the party whose interest would be affected by a decree establishing a lien upon the property. The petitioner *must, therefore, give that company notice, and since it exists within the jurisdiction of the court, the notice must be personal. All this proceeds, of course, upon the condition that the claim has*

been presented to the company for payment and adjustment, according to the express terms of the final decree, and rejected.

These preliminaries having been satisfied, it is competent for the court, if the plaintiff is by law entitled to a lien, to establish the same against the property, and to fix a time for the payment of the sum found to be due; and in default of payment at the time prescribed, a proper order of sale will be awarded."

It is a very familiar rule of law in this court, that no man shall be condemned, in his person or property, without due notice, and an opportunity of being heard in his defense. As was said by Justice Clifford, in delivering the opinion of this court in the case of *Ray* v. *Norseworthy* (23 Wall., 128):

"Notice in some form must be given in all cases, else the judgment, order or decree will not conclude the party whose right of property would otherwise be divested by the proceeding. No man is to be condemned without the opportunity of making a defense, or to have his property taken from him by a judicial sentence, without the privilege of showing, if he can, that the pretext for doing it is unfounded."

See, also,

Ray v. *Norseworthy*, 23 Wall., 128.
Windsor v. *McVeigh*, 93 U. S., 274.
Pennoyer v. *Neff*, 95 U. S., 714.
Heidritter v. *The Elizabeth Oilcloth Co.*, 112 U. S., 300.
Freeman et al. v. *Alderson et al.*, 119 U. S., 185.
Hassall v. *Wilcox*, 130 U. S., 493.
Scott v. *McNeal et al.*, 154 U. S., 34.
Holden v. *Hardy*, 169 U. S., 366.
Roller v. *Holly*, 176 U. S., 398.

The following cases are directly in point:

Smith et al. v. *Woolfolk*, 115 U. S., 149, and
Reynalds et al. v. *Stockton*, 140 U. S., 254.

A case very much in point, in which the authorities are reviewed at length, is that of *Hollister* v. *Mann et al.*, decided by the Supreme Court of Nebraska (58 N. W., 1126). On practically the same principle, this court has held that the title to real property, sold at a judicial sale, to a third party, is unaffected by a reversal of the case in which the judicial sale was made.

Gray v. *Brignardello*, 1 Wall., 627.

The taxes sought to be recovered by the intervening *petition were not in* existence at the time of the sale and its confirmation, and never came into existence, or became liens upon such property, until June 7, 1897, more than a month after the sale of the property and its confirmation.

I.

At the time of the hearing of this motion (for the first time) it appeared in the case, from the affidavit of Mr. Clancy, that the assessments of the railroad property, alleged to have been made by the collector as "additional assessments," on the tax rolls for the year 1896, and which were sought to be enforced in this proceeding, were, in fact, made by him on the 7th day of June, 1897, over a month after the sale and its confirmation. (Tr., p. 119.) This admission by the territory to the court at once disclosed to the court that it had no jurisdiction to enforce the collection of such taxes through an intervention in the foreclosure suit. The only statute in New Mexico providing for taxes becoming a lien upon real estate is section 2849. (See Appendix.) This section provides that taxes, when properly levied, are made a lien "from the date of the levy thereof." There was, and is, no statute in New Mexico which provides that when property omitted in previous years is placed upon the assessment roll, and assessed, with the levy of taxes extended against it, such assessment or taxes relate back to any previous time; consequently, when the taxes were levied by the collector, upon the assessment entered by him on the rolls of 1896, for the omitted years, the lien of the taxes dated from the date the assessment was placed upon such rolls, to-wit: June 7, 1897.

As was said by this court in the 5th point of its syllabus, in the case of *Heine* v. *Levee Commissioners* (19 Wall., 655):

"Taxes are not liens unless declared so by the legislature under whose authority they are assessed. *Still less can a lien be created by the mere duty to assess taxes, which has not been performed.*" (The italics are ours.)

This court again, in speaking through Justice Lamar, in the case of *Lyon* v. *Alley* (130 U. S., 177), says:

"The general rule is, that when no time is expressly fixed by the statute for the lien of taxes to take effect, it accrues upon the assessment of the taxes."

Judge Cooley in his work on taxes, page 305, says:

"Taxes are not commonly a lien upon lands unless made so by express legislative authority."

The Supreme Court of South Dakota, in the case of *Miller* v. *Anderson et al.* (47 N. W., 957), states the rule as follows:

"There is no lien on real estate for taxes, except by force of statute and a statute creating such lien must be strictly construed. Such statutory lien cannot be enlarged by construction."

See, also,

Creighton v. *Manson*, 27 Cal., 614.
State v. *Newark*, 42 N. J. L., 38.
Howell v. *Essex Co.*, 32 N. J. Eq., 672.
Garretson v. *Schofield*, 44 Iowa, 37.
Otoe Co. v. *Mathews*, 18 Neb., 466.
Myers v. *Burritt*, 60 Conn., 122.
New England L. & T. Co. v. *Young*, 81 Iowa, 738.
Philadelpnia v. *Greble*, 38 Pa. St., 339.
Board of Education v. *Old Dominion Iron, etc., Co.*, 18 West Va., 441.

Kentucky Central R. R. Co. v. *Commonwealth*, 92 Ky., 64.
Tousey v. *Post*, 91 Mich., 631.
Anderson v. *State*, 23 Miss., 459.

II.

The taxes levied by the collector on June 7, 1897, upon the roll of 1896 became payable one-half on the first day of the following January, and the other half on the first day of July in the following year, under the provisions of sections 4052 and 4056 of the Compiled Laws of 1897, ~~as amended by sections 12 and 14 of chapter 61 of the Laws of New Mexico of 1899.~~ (See Appendix.) It appeared, therefore, to the court from the statement of the territory made before it that the territory had commenced this proceeding to recover taxes which were first levied after the court had parted with the possession of the property, on which they were levied, and that at the time when the proceedings were instituted no part of the taxes sought to be recovered could become due until more than six months after the filing of the petition in intervention. The court and everyone else but the territory had supposed, and had the right to suppose, prior to this statement by the territory, through its solicitor, Mr. Clancy, that these additional assessments and the levy of taxes thereon, which were sought to be enforced, had been made in the year 1896, between the first day of August, in that year, and the first day of January, 1897.

None of the questions here presented could have been presented to this court when this case was previously before it.

The territory having taken the former appeal from the order of the District Court dismissing the intervening petition had caused to be certified to the Supreme Court of the territory such part of the record in the foreclosure case as it deemed essential to present the questions sought to be raised by it and in taking the appeal from the Supreme Court of the territory to this court, it brought to this court only that part of the record that it had taken to the Supreme Court of New Mexico. The part of the record in the foreclosure case presented to this court on the former hearing of this matter consisted only of the bill to foreclose, the order appointing the receiver, the intervening petition filed by the territory, and the pleas thereto filed by the receiver and the United States Trust Company, and the order dismissing it. Nothing appeared in that transcript before this court to show that any final decree of foreclosure had been entered, much less that the property had been sold, or that the taxes sought to be recovered were levied for the first time a month after the sale of the property and its confirmation under a final decree in the foreclosure case.

SECOND POINT.

The District Court erred in overruling the plea in abatement, filed on the 27th day of September, 1899, and the Supreme Court of the Territory of New Mexico erred in affirming such ruling.

After the motion to dismiss was overruled by the District Court, the court, upon application of the receiver, and the United States Trust Company, made an order permitting such parties to withdraw the pleas in bar which they had filed to the intervening petition on the 23rd day of June, 1897, and authorized the parties to file a plea in abatement to the matters contained in the intervening petition. (Tr., pp. 129, 130.)

I.

The order of the court allowing the withdrawal of the former pleas in bar, and the filing of a plea in abatement, was an order which the court had a right to make, in its discretion.

Eberly et al. v. *Moore et al.*, 24 How., 147.
Elder v. *Bank*, 17 Wall., 551.
Kern v. *Huderkoper*, 103 U. S., 485.

This action was sustained by the Supreme Court of New Mexico. (Tr., p. 327.) We believe that it was proper to file the motion which was filed to dismiss the action.

Morris v. *Gilmore*, 129 U. S., 316.
Shreveport v. *Cole*, 139 U. S., 36.

Yet, out of an abundance of caution it was deemed best to file a plea in abatement, raising the same questions as

were raised by the motion to dismiss. The material questions raised by the plea in abatement, which we rely upon, have heretofore been fully discussed, with reference to the ruling of the court upon the motion to dismiss. However, we call the court's attention to the fact that the plea in abatement was set down for argument, and, upon argument, was held insufficient, in law and in equity, to abate the intervening petition. This action leaves the several matters stated in the plea in abatement as absolutely true, and the ruling of the court thereon must be adjudged upon the assumption that everything stated in such pleas was true and correct.

THIRD POINT.

The District Court erred in overruling each of the grounds of demurrer specified to that portion of the intervening petition which alleged taxes to be due upon an additional assessment of the property in controversy, for the year 1892, upon the assessment roll of 1896, alleged to have been assessed in the sum of $394,550, and the Supreme Court erred in affirming such ruling.

After the plea in abatement was overruled, Mr. Smith and the trust company filed a joint and several demurrer to the intervening petition. (Tr., pp. 132–150.) This demurrer was partially overruled and partially sustained. (Tr., pp. 130, 131.)

For the convenience of the court, we herein copy that portion of the intervening petition to which the demurrer was overruled, to-wit:

"The said collector, for the year 1892, entered upon his tax list as aforesaid an additional assessment of property of said railroad company, of which additional assessment a copy is attached hereto and hereby declared to be a part hereof, from which it appears that the total valuation of said property amounted to $620,390. The tax regularly levied by the proper authorities upon all property within said county for the year 1892, for territorial and county purposes, was at the rate of twenty-one and nine-tenths mills, so that the amount of tax upon the valuation aforesaid amounts to $13,586.54, one-half of which became delinquent upon the first day of January, 1893, and the other half on the first day of July, 1893, said halves bearing interest respectively, from said respective dates, at the rate of twenty-five per centum per annum." (Tr., p. 51.)

The copy of the exhibit referred to in this allegation is as follows:

"ADDITIONAL ASSESSMENT FOR THE YEAR EIGHTEEN HUNDRED AND NINE-TWO.

The following was omitted in the assessment of the year 1892 and was not put upon the assessor's book, and is now, in accordance with the provisions of sections 2847 and 2848, here listed, valued and assessed by the collector: * * *

Also the cross-ties, rails, fish-plates, bolts, spikes, bridges, culverts, telegraph line, and other structures erected upon the right of way of the Atlantic and Pacific Railroad Company in said County of Valencia and constituting 'improvements' upon the land embraced within said right of way where it runs over land which was held in private ownership at the time of the grant of said right of way to said railroad company, 60.7 miles, valued at $6,500 per mile, $394,550." (Tr., p. 53.)

GROUNDS OF DEMURRER TO THE PORTION OF THE INTERVENING PETITION ABOVE SET OUT

"And C. W. Smith, as such receiver, and the United States Trust Company doth further jointly and severally demur as to so much and such part of said intervening petition as seeks to recover from the funds in the hands of the receiver, or to establish a claim against him as such receiver of the property in his custody as such receiver for the same upon an assessment made by the collector of said county in the year 1896, for the year 1892, as and for an additional assessment of such property for the year 1892 and which is alleged to have been assessed at the sum of $394,550, and for cause of demurrer saith:

1. That said portion of said intervening petition referred to is without equity, in respect to the claim of the territory to collect taxes levied upon the assessment made in 1896, for the year 1892.

2. That the said portion of said intervening petition referred to is indefinite, uncertain and insufficient, in that it does not disclose by any sufficient description the property which is alleged to have been assessed by said collector in the year 1896, for the year 1892, at the sum of $394,550, as aforesaid.

3. That neither the portion of said intervening petition referred to, nor the intervening petition in its entirety, discloses that the property alleged to have been listed at the valuation of $394,550 had any of the taxes sought to be recovered assessed against it by the collector, or any other person, upon such assessment.

4. That the said portion of said intervening petition referred to wholly fails to set forth and disclose any notice given by such collector of such additional assessment, as above referred to, to the Atlantic and Pacific Railroad Company, or to its receivers, or any other person or persons.

5. That upon the face of the facts stated in said portion of said intervening petition, the property assessed at the said sum of $394,550 was assessed as personal property, and not as real estate, although the same appears to have been and is shown by said intervening petition to have been real estate, capable of being described as such sufficiently in accordance with the requirements of the statutes of New Mexico for the assessment of real estate.

6. That it is impossible to ascertain from the facts stated in the intervening petition concerning the assessment made in 1896 for the year 1892, as to what exact mileage of right of way of the Atlantic and Pacific Railroad Company is claimed in said intervening petition to have been acquired by the Atlantic and Pacific Railroad Company from any person, persons or corporations other than the government of the United States, or from any lands other than public lands." (Tr., pp. 134–135.)

That all the property included in this additional assessment was, and is, real estate under the provisions of section 2807 (see Appendix) of the Compiled Laws, is settled beyond any question of doubt by the decision of this court in the case of the *Territory of New Mexico* v. *The United States Trust Company* (172 U. S., 171).

Section 2834 (see Appendix) provides for the making of an assessment book, or roll, in which are entered the different kinds of property to be assessed, etc.

Section 2835 (see Appendix) provides that each tract of land shall be valued and assessed separately, etc.

It will be seen by the sections referred to that the scheme provided for the assessment and taxation of property requires a list in writing made by the owner, or person in charge of property liable to assessment and taxation; but if the owner is absent, or unknown, and the property is not listed by anyone else, then the assessor himself makes the list.

By the provisions of sections 2847 and 2848 (see Appendix) omitted property when assessed by either the assessor or collector is to be listed as well as valued. It is perfectly evident that the list of property for assessment, whether made by the owner, person in charge, assessor or collector, must contain such a description of the real estate as is required by the provisions of section 2822.

The statutes referred to are practically copies of the statute in force in Montana, as will be seen by referring to the opinion of Justice Knowles in the case of *Powder River Cattle Company* v. *Board of Commissioners*, 45 Fed., 325.

The Supreme Court of Montana, in construing this statute in the case of the *N. P. R. R. Co.* v. *Carland* (5 Montana, 146, 3 Pac. Rep., 134), holds that the necessity of the description required by the statute, of real estate, separate and by itself, is a necessary part of the statement, and an assessment of property which does not comply with it is absolutely void. To the same effect is the decision of Justice Knowles above referred to.

This court in the case of *Lyon* v. *Alley* (130 U. S., 177) lays down the rule as follows:

"When the requisitions prescribed for the assessment and collection of taxes are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and gener-

ally would be injuriously affected, they are not directory, but mandatory, and must be followed.

Provisions of statutes as to the form and mode of assessments, and the place where the tax lists are to be deposited, are designed for the benefit of the taxpayers and the protection of their property from sacrifice."

See also to the same effect:

French v. *Edwards*, 13 Wall., 506.
Bird v. *Benliss*, 142 U. S., 664.
Van Cise et al. v. *Carter*, 68 N. Y., 539.

The exhibit showing the details of this assessment discloses that there were 93.7 miles of these improvements on the right of way of the railroad company in Valencia County, 33 miles of which were by the statements made in the assessment exempt from taxation, and from the same statements 60.7 miles were not exempt, and that these 60.7 miles of this total mileage which were not exempt were assessed in gross at $394,550. (Tr., p. 63.)

Whether these 60.7 miles that were subject to taxation according to the statements made in this assessment, were together, in a continuous line, or separated by any of the miles that were exempt, does not appear. This assessment was, and is, precisely like an assessment of 63.7 acres of land in a tract of 93.7 acres, without any description to identify any one of the 63.7 acres from any other one of the 93.7 acres. Would it be possible for the owner, or for anyone else, to determine where any one of the 60.7 miles that entered into this assessment was located in the total mileage of 93.7 miles in Valencia County? Was this such a description as the mandatory provisions of the statute required?

As an answer to this question we quote from the decision

of the Supreme Court of Nebraska in the case of *Johnson County* v. *Tierney et al.* (76 N. W., 1090), as follows:

"The assessment and taxation of lot 5 for 1882 and 1883 was under this description: 'Part of lot 5.' This designation, considered by itself, or in connection with the evidence contained in the record before us, furnishes no means by which we can determine, or even conjecture, what portion of the property is charged with the taxes. It was not a fractional lot. It was all owned by the heirs of Mary A. Tierney. It was all subject to taxation, yet only a part of it was taxed. We cannot say what part, and therefore hold that the taxes are void. *Lessee of Massie's Heirs* v. *Long*, 2 Ohio, 287; *Lessee of Mathews* v. *Thompson*, 3 Ohio, 272; *Ronkendorff* v. *Taylor's Lesee*, 4 Pet., 350; *Burchard* v. *Hubbard*, 11 Ohio, 316; *Raymond's Lessee* v. *Longworth*, 14 How., 76; *People* v. *Flint*, 39 Cal., 670; *Atwell* v. *Zeluff*, 26 Mich., 118; *Sims* v. *Warren*, 67 Miss., 278, 7 South, 226."

We also quote the first point in the syllabi in the decision of the Supreme Court of Louisiana in the case of *Augusti et al.* v. *Lawless et al.* (14 Southern 228):

"An assessment that does not contain a description sufficient to identify the property assessed is illegal and void, and therefore beyond the healing power of the curative statute of 1884, a sufficient description of the property being an indispensable prerequisite to the exercise of the taxing power."

We also quote the third point of the syllabi in the decision of the Supreme Court of Michigan in the case of *Jackson* v. *Sloaman*, 75 N. W., 282, as follows:

"In assessment proceedings, the description of the land must be sufficiently definite and certain as not to require resort to extrinsic proof that a particular piece of land was designated."

See, also,

Jones v. *Pelham*, 84 Ala., 208.

People v. *Mahoney*, 55 Cal., 286.

Raymond v. *Longwood*, 14 Howard, 76.
Turner v. *Yeoman*, 16 Ohio, 25.
Symmes v. *Warren*, 67 Miss., 278.
People v. *Hyde*, 48 Cal., 431.
Ainsworth v. *Dean*, 21 N. H., 400.
Treon v. *Emerick*, 6 Ohio, 391.
Cooley on Taxation, 281.
Jory v. *Palace Dry Goods and Shoe Co.* (Ore.), 46 Pac., 786.
Van Cise et al. v. *Carter*, 68 N. W., 539.

II.

As before stated, the intervening petition was required to set forth sufficient facts to show that the tax sought to be recovered was a valid and legal tax, which was a lien upon certain real estate, describing it. (See section 4157, Compiled Laws New Mexico, Appendix.)

State v. *Howard*, 80 Ind., 466.
People v. *C. P. R. R. Co.*, 83 Cal., 393.

The collector acting under the authority of section 2848 of the Compiled Laws of 1884 (see Appendix) was required "to list, value and assess such property." The requirement that the collector should assess such property after its valuation was a requirement that he should extend the taxes levied against its value.

Savings Bank v. *United States*, 19 Wall., 227.
People v. *Weaver*, 100 U. S., 545.

The intervening petition fails to allege any extension of any tax against the valuation of the property. It simply alleged the valuation made by the assessor, and

then the rate of taxation which was in force during the year 1892; it nowhere alleged that the collector entered upon the tax rolls any tax against this valuation; hence the third ground of the demurrer should have been sustained.

State v. *Perkins*, 24 N. J. L., 409.
Seymour v. *Peters*, 67 Mich., 415.
C. M. & St. P. Ry. Co. v. *County of Cossuth*, 41 Iowa, 57.
Barker v. *Early*, 33 Mo., 677.
Moon v. *Marsh*, 40 Kansas, 58.

~~THIRD POINT.~~

III

The demurrer contained the same grounds of demurrer to each one of the additional assessments made for the years 1893, 1894, 1895 and 1896 as those which we have presented in relation to the additional assessment for the year 1892. We therefore claim that the court erred in overruling each one of these grounds of demurrer to each of the other claims, upon the same grounds and for the same reasons as heretofore stated in relation to the demurrer to the assessment for 1892, hence it is unnecessary to repeat the argument already made.

FOURTH POINT.

The District Court erred in overruling the joint and several plea in bar, filed to the intervening petition on the 30th of September, 1899, and the Supreme Court of the Territory erred in sustaining such ruling.

Upon the disposition of the demurrer by the District Court, the appellants filed, by leave of the court, a plea in bar to the intervening petition. (Tr., pp. 151-212.) Previous to its filing, it was agreed between the parties and the court that such plea might embrace every fact, in one plea, that could be inserted in a plea, "regardless of whether or not such facts, or any of them, ought, under strict rules of pleading, to be required to be embraced in separate pleas." (Tr., p. 131.) On October 5, 1899, an agreed statement of facts was filed in the cause. (Tr., pp. 212-288.) This agreed statement of facts contained, among other things, the following provision:

"That any point stated in such plea, where modified, changed, or otherwise stated herein, shall be deemed to have been stated in the plea as herein stated, and to save the time that might be taken by joining issue of fact on such plea, it is further agreed that any fact herein stated, and not stated in said plea which may be material, may be considered by the court as plead in the plea upon the hearing of its sufficiency." (Tr., p. 288.)

On the same day, the plea was set down for argument, and upon argument was overruled. (Tr., p. 288.)

FIRST.

The additional assessment of the property alleged in the intervening petition to have been placed by the collector on the tax rolls of 1896, as property omitted from the assessment roll of 1892 to 1896, inclusive, was property which had been placed upon the assessment rolls of 1892 to 1896, inclusive, at the proper time, by the assessors of Valencia County; therefore, not being property omitted from the assessment rolls of 1892 to 1897, the action of the collector in placing the same upon the tax list for 1896, as "additional assessments," was without jurisdiction, and void.

I.

The plea and agreed statement of facts in this case disclose that in 1892 the Atlantic and Pacific Railroad Company, at the proper time, made a return to the county assessor of Valencia County of all the property of the railroad company situated in that county, claiming, however, that the right of way described in such return was exempt from taxation. The county assessor, at the proper time in that year, entered upon the assessment roll, as the assessed total value of the right of way of the Atlantic and Pacific Railroad Company, the sum of $327,103, against which was extended upon the tax roll of that county for that year the taxes levied upon such assessment, the total being the sum of $8,501.24. The assessment roll containing this assessment was properly approved by the board of county commissioners of Valencia County, and a warrant issued to the collector to collect the taxes mentioned. (See plea, Tr., pp. 152, 153; agreed statement of facts, Tr., p.

277, and Exhibits 1, 2 and 3, attached to plea, Tr., pp. 169–173.)

This assessment of the right of way being based upon the return made by the railroad company estopped it and its receivers from questioning the sufficiency of the description contained in it.

Moody et al. v. *City of Galveston* (Tex.), 50 S. W., 481.

Jory v. *Palace D. G. Co.*, 46 Pac. (Oreg.), 789.

Lake County v. *Sulphur Bank Mining Co.*, 68 Cal., 14.

People v. *Atkinson*, 103 Ill., 45.

Pingree v. *Berkshire County*, 102 Mass., 76.

American Union Express Company v. *St. Joseph*, 66 Mo., 675.

Matthews v. *Kansas*, 80 Mo., 231.

Sage v. *Burlingame*, 74 Mich., 120.

Leonard v. *Madison County*, 64 Iowa, 418.

Baraboo Water Works Co. v. *Rice County*, 44 Minn., 12.

As was said by Justice McKenna, in delivering the opinion of the court on the hearing granted in the former appeal, in speaking of the return made by the railroad company, and the entries upon the assessment roll, which were shown by the pleas to the intervening petition (then being considered by the learned justice):

"The right of way therefore was assessed in 1892, and whatever taxes were due on it, or any part of it, were left delinquent. * * * It is manifest that the right of way was assessed and the taxes were delinquent." (174 U. S., 550.)

It must be clear that if the right of way in Valencia

County was placed by the assessor upon the assessment roll for 1892, such right of way included every item of property embraced in the "additional assessment" for 1892. This point was expressly determined by this court in a case between the same parties. (172 U. S., 171.) The property embraced in the "additional assessment" for the year 1892, described in the intervening petition, was not, therefore, property omitted from the assessment rolls of 1892, and hence the collector, under the provisions of section 2848 of the Compiled Laws of New Mexico of 1884 (see Appendix), had no jurisdiction to place such "additional assessment" upon the rolls of 1896. The authority granted by sections 2847 and 2848, to put an "additional assessment" upon the tax roll in his hands, is only granted when such property has been omitted from the assessment rolls of any previous year. If the property involved was actually placed upon the assessment roll for 1892, by no matter how defective a description, the fact of its being named there prevented the right of the collector to act under the sections named.

Lehrman, Durr & Co. v. *Robinson et al.*, 59 Ala., 219.

Allwood v. *Cowen*, 111 Ill., 481.

II.

In 1893 the assessor of Valencia County entered upon the assessment roll at the proper time the assessment of the right of way of the Atlantic and Pacific Railroad Company in the sum of $327,103, which was raised by the board of county commissioners to $391,640.24, and against which the taxes were extended upon the tax rolls, amounting, in the total, to the sum of $7,353.09. (Exhibit 7, Tr., pp.

186, 187.) Subsequently, on June 4, 1894, Mr. Luna (who as collector made these "additional assessments" on June 7, 1897) filed in the foreclosure suit then pending in the District Court below, of the *Mercantile Trust Co* v. *Atlantic & Pacific R. R. Co.* (a suit to foreclose a second mortgage), an intervening petition and an amended intervening petition to collect the taxes alleged to have been levied against the assessment of the right of way on the tax rolls of 1892 and 1893. (See Tr., pp. 175-183.) It will be observed that in these intervening petitions Mr. Luna alleges the due assessment of the right of way by the proper officer, at the proper time. These intervening petitions were verified by Mr. Luna. Mr. Luna, therefore, had full and complete knowledge of the assessment of the right of way in Valencia County for the years 1892 and 1893, at the time when he attempted to make an "additional assessment" of omitted property, and hence acted upon the assumption ~~only~~ only that the property omitted for the years involved was the superstructure which, in his then opinion, was not a part of the right of way placed upon the assessment rolls for those years. If there was any inaccuracy in the description of the right of way, it might have been remedied by the taxing officers, as claimed by Mr. Luna, in his amended petition in intervention under the provisions of section 2883 of the Compiled Laws of New Mexico of 1884. (See Appendix.)

III.

In the year 1894 there was placed by the assessor for Valencia County at the proper time on the assessment rolls under the name of Atlantic and Pacific Railroad Company as owner, "93.458 miles main track" assessed at $6,500 a mile; total, $607,477.90, against which the taxes for that year were extended. (See Exhibit 9, Tr., pp. 193, 194.)

IV.

In 1895 there were placed upon the assessment roll by the assessor at the proper time an assessment under the name of the Atlantic and Pacific Railroad Company, as follows:

"Cross-ties, rails, fish-plates, spikes, culverts, bridges, depots, turntables, side tracks, buildings and entire superstructure on right of way, 93.7 miles, in Valencia County, at $6,500 per mile." (See Exhibit 11, Tr., p. 199.)

It will be observed that this description was practically the same description employed in the "additional assessments" for that year.

Making a total assessment of $609,050, against which the taxes were extended on the tax rolls for that year. (See Exhibit 11, Tr., pp., 199, 200.)

V.

In 1896 the assessor of that county in due time placed upon the assessment roll under the name of the Atlantic and Pacific Railroad Company an assessment reading as follows (see Exhibit 13, Tr., pp. 205, 206):

"Cross-ties, rails, fish-plates, spikes, culverts, bridges, depots, turn-tables, side tracks, buildings and entire superstructure on right of way, 93.7 miles, in Valencia County, at $6,500 per mile." (See Exhibit 13, Tr., pp. 205, 206.)

Against which the taxes were extended on the tax rolls for that year.

The allegations in the plea concerning these matters are found in the transcript at pages 152 to 167, and in the agreed statement of facts at pages 176 to 283, ~~and these allegations are agreed to be true in the agreed statement of facts. (Tr., pp. 277–280.)~~

VI.

Sections 2847 and 2848 of the Compiled Laws of New Mexico of 1884 constituted the only authority upon which the collector acted in making the "additional assessments" set out in the intervening petition, and while set out in the appendix we here copy them for convenience of the court:

"Sec. 2847. If by any means any property shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same when discovered shall be listed by the assessor and placed upon his roll before the same is returned to the board of county commissioners, with all arrearages of taxes which should have been assessed and paid in former years charged thereon, or in case of failure of the assessor, the same shall be assessed by the collector in the manner provided in the next section,

"Sec. 2848. When the collector of any county, after the tax list has been delivered to him, ascertains that any real estate, or any personal property then in his county are omitted from the tax list, and has reason to believe that such personal property has not been taxed in any other county for that year, he shall forthwith proceed to list, value and assess such property in the same manner that the assessor might have done, and shall enter such assessment in his tax list following the entries made by the clerk (and such entries shall be designated as "additional assessments"), and the taxes so assessed by the collector shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided. But the person so assessed shall have the right of appeal to the board of county commissioners for a correction or abatement of such assessment, or refunding any part of the tax erroneously assessed, if paid by him."

The assessment referred to in section 2847 means not only the listing of the property upon the assessment roll, but its valuation.

Cooley on Taxation (2nd Ed.), page 251.

The property described in the "additional assessment" made by the collector on June 7, 1897, was certainly listed upon the assessment and tax rolls for each of the years of 1892 to 1896, inclusive, and it was also valued for each of these years at the proper time in each of these years by the officers whose duty it was to list such property upon such rolls, ~~and it was also valued for each of these years;~~ the fact that there was included within the listing property which was exempt, as well as property not exempt from taxation, does not affect the question as to whether any of such property was omitted in the assessment of any year. Everyone must concede that under the decisions of this court referred to the listing of the right of way on the assessment roll by the assessors in each of the years in controversy included the identical property which the collector claimed had been omitted from the assessment rolls of former years, and that the placing of it upon the tax rolls for each of the years, with the extension of taxes against it, precluded the collector from acting under the sections referred to, in 1897, even though the assesment and the taxes extended to it were void, because of the including of property exempt, and not exempt from taxation in the one assessment and the one levy.

The improvements upon real estate in New Mexico are not separately assessed from the real estate to which they are attached. Sec. 3017, Compiled Laws 1884 (Appendix).

The county officials of Bernalillo and Valencia Counties, and the learned counsel for the territory, Mr. Clancy, had persuaded themselves long prior to the time of making these "additional assessments," that the superstructure placed upon the right of way of the Atlantic and Pacific Railroad Company constituted no part of such right of way, and was not therefore included in any assessment of the right of way, as such. It was upon this theory that the appeal which was heard by this court in the case of *New Mexico* v. *United States Trust Company* (172 U. S., 171) was taken from the decision of the Supreme Court of New Mexico to this court. This appeal was pending and not yet heard by this court when these "additional assessments" in controversy were made on June 7, 1897. Acting upon this theory only, the collector, on June 7, 1897, claimed that the superstructure on the right of way in Valencia County had been omitted from the assessment and tax rolls of Valencia County for the years 1892 to 1896, inclusive. It will be seen, by referring to the intervening petition and its exhibits (Tr., pp. 50–57), that this view of the theory upon which the county officials acted is correct, because no part of the right of way as such was attempted to be placed upon the tax rolls by the collector in making his "additional assessments." Everything placed upon the tax rolls by the collector was a part of the superstructure upon the right of way, which was subsequently determined by this court to be a part of the right of way itself. This court having afterwards de-

termined (on December 5, 1898) that the property placed upon the tax rolls by the collector as "additional assessments" was real estate, and a part of the right of way itself, practically determined that this action of the assessor, based upon the statutes referred to, was null and void, under the facts presented.

SECOND.

Under the allegations in the plea, supplemented by the statement of facts agreed upon, the collector of Valencia County was without jurisdiction to make the "additional assessment" alleged to have been made by him upon the tax list of 1896, even though the property so assessed was omitted from the assessment rolls, or tax lists, for the years 1892 to 1896, inclusive.

I.

Admitting, for the sake of the argument only, that the property placed by the collector upon the tax lists of 1896 on the 7th day of June, 1897, was property which had been omitted from assessment and taxation during the years 1892 to 1896, inclusive, we say:

That the action of the collector in listing such property upon the tax list of 1896 on the 7th of June, 1897, was without authority or warrant of law. The collector could only act after the tax list of 1897 had been placed in his hands, and then his assessment of the property previously omitted was required to be made upon that tax list, and was not authorized to be made upon the tax list of 1896. A valid assessment by the officers appointed by the law was at that time a prerequisite to the levying of any valid taxes on taxable property in Valencia County. As stated by Justice Cooley (Cooley on Taxation, 2nd Ed., page 352):

"An assessment when taxes are to be levied upon a valuation is obviously indispensable. It is required as the first step in the proceedings against individuals subjects of taxation, and is the foundation of all which fol

lows it. Without an assessment they have no support, and are nullities. The assessment is, therefore, the most important of all the proceedings in taxation, and the provisions to insure its accomplishing its office are commonly very full and particular. * * * The assessment must, therefore, be made by the proper officers or it will be void."

This court has fully approved the doctrine of the text quoted, in the case of *Hager* v. *Reclamation District* (111 U. S., 710.)

Under the scheme of taxation created by the revenue laws of New Mexico in force in the year 1897, all property subject to taxation in Valencia County for that year was, in the first instance, to be assessed by the county assessor after having been listed by the owner, if the owner could be found. If there was taxable property in that county which had escaped taxation for any previous year or years, and was discovered by the assessor previous to turning his rolls over to the county board of equalization, he was required to list such property upon his assessment roll, with all arrearages and taxes which should have been assessed and paid in former years charged thereon. The roll, when completed, was under the oath required to be taken by the assessor, and to be turned over to the county board of equalization, meeting on the first Monday of June in that year, and this board was authorized to supply any omissions and correct any assessments, etc. At such meeting, or at some subsequent session, the board of county commissioners were required to approve such assessment roll. Under these laws the assessor had in his possession, from the first day of March until the first Monday of June, the assessment roll. Of this and the fact that he was required to list thereon and value all taxable property that had escaped taxation for previous years in that county, everyone not only had notice, but the laws referred to protected the right of

everyone by giving to every person whose property was listed upon such rolls an appeal, not only to the county board of equalization, but from its action to the territorial board of equalization, and these appeals when taken were to be heard and disposed of before any taxes became final. This right of appeal was given by these statutes to the owner of property placed upon the tax rolls as property which had escaped taxation in previous years.

(See decision of this court upon a very similar statute in the case of *Winona & St. Peter Land Co.* v. *State of Minnesota*, 159 U. S., 534.)

While it was the duty of the assessor and the county board of equalization to act between March 1st and August 1st of 1897, there was not only no reason for but no authority conferred by the statutes upon the collector to act prior to the tax list of 1897 being turned over to him. The warrant to the collector to act in any case was only granted by the statute "in case of the failure of the assessor" to place the omitted property upon the tax list of that year. (See section 2847, Appendix.)

The collector did not have to take any oath concerning an assessment to be made by him, and from him no appeal was given by these statutes, except to the board of county commissioners, which would only meet after he could act in the October following in that year, and the first Monday of January in the succeeding year. (See section 2848, Appendix.) If the legislature had contemplated any action on the part of the collector prior to the time of receiving the tax list, it certainly would have granted an appeal to the county board of equalization, which meets in June and July, instead of granting the appeal to the board of county commissioners, and from whom no appeal could be taken to the territorial board of equalization.

By the provisions of the statutes every taxpayer whose property appeared upon the assessment rolls in any given year had the right to two appeals, one to the county board of equalization and the other from that to the territorial board of equalization, but in case of action on the part of the collector in placing property as omitted property on a tax list in his possession, but one appeal is granted, the legislature evidently intending that such action would not take place until after it would be too late to allow an appeal to either the county or the territorial boards.

It was alleged in the plea under consideration that at the time when the collector acted in placing these "additional assessments" on the tax list of 1896, to-wit, on June 7, 1897, the assessor of the county had in his possession and under his control the assessment rolls for 1897. (Tr., p. 155.) In the agreed statement of facts it was agreed as follows:

"That on June 7, 1897, the county assessor of said county had in his possession the assessment rolls of said county for the year 1897, but they were not then completed and were completed, verified and turned over by the assessor on the 6th of Sepeember, 1897. That the assessment so made by Solomon Luna on June 7, 1897, upon the tax lists of 1896, were never presented to nor approved by the board of county commissioners of said county."

II.

It has been many times asserted by this and many other courts, that any revenue law must provide for some kind of notice to the taxpayer of the assessment and levy of taxes upon his property.

Davidson v. *New Orleans*, 96 U. S., 97.

Hagar v. *Reclamation District*, 111 U. S., 701.

Bellingham Bay & Co. v. *New Whatcom*, 172 U. S., 318.

Patten v. *Green*, 13 Cal., 325.

Hagenmeyer v. *Board of Equalization*, 82 Cal., 214.

Darling v. *Gunn*, 50 Ill., 424.

People v. *Ward*, 105 Ill., 620.

South Platte Land Co. v. *Buffalo County*, 7 *Neb.*, 253.

Alleghany County v. *New York Min. Co.*, 76 Md., 549.

State v. *Parker*, 34 N. J. L., 49.

State v. *Carragan*, 37 N. J. L., 264.

State v. *Harrison*, 39 N. J. L., 51.

Auer v. *Dubuque*, 65 Iowa, 650.

Avery v. *East Saginaw*, 44 Mich., 587.

Thomas v. *Gain*, 35 Mich., 155.

24 Am. Rep., 535.

Dool v. *Cassopolis*, 42 Mich., 547.

Mauer v. *Cliff*, 94 Mich., 194.

Relfe v. *Columbia L. Ins. Co.*, 11 Mo. App., 374.

Scott v. *Brackett*, 89 Ind., 413.

Kuntz v. *Sumption*, 117 Ind., 1.

Santa Clara County v. *Southern Pac. Ry. Co.*, 18 Fed. Rep., 385.

French v. *Edwards*, 13 Wall. (U. S.), 506.

Albany City Nat. Bank v. *Maher*, 19 Blatchf. (U. S.), 179.

Exchange Bank Tax Cases, 21 Fed. Rep., 99.

Dean v. *Aiken*, 48 Vt., 541.

Alabama, etc., R. R. Co. v. *Brennan*, 69 Miss., 103.

Kansas Pac. R. Co. v. *Russell*, 8 Kan., 558.
Gibbons v. *Adamson*, 44 Kan., 203.
New Orleans v. *St. Romes*, 28 La. Ann., 17.
New Orleans v. *Stewart*, 28 La. Ann., 180.

The statutes in force at the time, authorizing the assessment of any property in that county, in 1897, that was omitted from the assessment rolls of previous years, would be notice to the owner (under the decisions of this court) that the assessor might discover the omission in the previous year or years and place the property so omitted on the assessment rolls for that year; that the county board of equalization might discover it and place it upon the rolls at its June session of that year, or that if the assessor and the county board of equalization failed to discover it and place it upon the assessment roll, prior to the first day of August of that year the collector himself might discover it, and place it upon the tax list; but these statutes were not notice to the owner of such property, or anyone else, that the collector of that county, in June, 1897, might place this property upon the tax list of 1896. It is alleged in the plea under consideration that no notice was ever given of the action of the collector on June 7, 1897, by the collector, or anyone else to the purchasers at the sale, or their assignee, the Santa Fe Pacific Railroad Company, beyond such notice as might have been given by the filing of the intervening petition (Tr., p. 155), and this allegation is admitted to be true in the agreed statement of facts. (Tr., p. 284.)

THIRD.

The taxes sought to be recovered in the intervening petition did not exist until after the property was sold and delivered by the court to the purchasers.

The plea shows that on the 3rd of May, 1897, the property was sold, and the sale confirmed on the 4th of May, 1897; that a deed of conveyance was made to the purchasers on the 2nd of June, 1897; that on the 22nd day of June, 1897, the purchasers sold and conveyed the property to the Santa Fe Pacific Railroad Company, created under the act of Congress approved March 3, 1897; that on the 1st day of July, 1897, the property was delivered by the receiver to the Santa Fe Pacific Railroad Company, the assignee of the purchasers. (Tr., pp. 154–156.) These allegations were admitted to be true in the agreed statement of facts. (Tr., pp. 283, 284.)

There was no statute in New Mexico requiring the making of these taxes, when levied, to relate back to any previous time, or date, and whether rightfully levied by the collector, or not, they could only become due on the first of January, 1898.

Winona & St. Peter Land Co. v. *State of Minnesota, supra.*

We refer to the argument heretofore made upon this point, on the motion to dismiss.

FOURTH.

Every point, argument and authority presented herein in support of the motion to dismiss, and the plea in abatement, is applicable in support of this plea in bar, because of the fact that all the facts on which the motion to dismiss, and plea in abatement, were based, *dehors* the record, were made to fully appear by the admitted truth of the facts stated in the plea in bar, also the admitted facts stated in the agreed statement of facts.

The plea alleged, and the agreed statement of facts admitted: That this property was sold, under the decree of the court, on May 3, 1897; that the sale was confirmed on May 4, 1897; that a deed of conveyance, in accordance with the decrees, was executed by the master to the purchasers on June 2, 1897; that on June 22, 1897, the purchasers conveyed the property sold to the Santa Fe Pacific Railroad Company; that on July 1, 1897, at the request of the purchasers, the receiver delivered possession of the property sold to the Santa Fe Pacific Railroad Company; that the taxes in controversy were first levied, and first became a charge upon the property, on June 7, 1897; that the receiver was discharged in October, 1898.

Upon these facts it is clear that the court had no jurisdiction to proceed further with the hearing of the matters set out in the intervening petition. While the questions of law arising from these facts have heretofore been discussed, we again call the attention of the court to them, on account of the facts being alleged in the plea, and admitted by the agreed statement of facts to be true, so that

if for any reason any of these matters could not be considered upon the motion to dismiss, or the plea in abatement, the court can consider them upon the questions arising under the plea in bar upon the agreed statement of facts.

FIFTH POINT.

The Supreme Court of New Mexico erred in its determination that fifty-five and one-half miles of the right of way formerly belonging to the Atlantic and Pacific Railroad Company, and owned by the Santa Fe Pacific Railroad Company, or any portion thereof, was subject to assessment and taxation for the years 1892, 1893, 1894 and 1895, in Valencia County.

The District and Supreme Courts below severally determined that that portion of the right of way of the Atlantic and Pacific Railroad which crosses certain alleged Spanish grants was right of way acquired from private ownership and was therefore not exempt from taxation, under the second section of the Atlantic and Pacific charter (Tr., pp. 292–314) as construed by this court.

The facts concerning the portion of the right of way which passed over these Spanish grants are set out in full in the agreed statement of facts. (Tr., pp. 212–272.) The title papers covering each grant referred to are fully shown in the agreed statement of facts. Under the facts agreed upon we claim:

Under the act of Congress creating the Atlantic and Pacific Railroad Company the right of way granted over the public domain included a right of way over lands claimed under alleged Spanish or Mexican grants, the title whereto was not perfect at the date of the act, or which had not been definitely segregated from the public domain, or where there existed any power of disposition in the United States by reason of the peculiar nature or character of the alleged claim or grant.

In *New Mexico* v. *United States Trust Company*, 174 U. S., 545, this court held that the part of the right of way which was granted under section 2 of the act of Congress in question, together with the superstructure thereon, was exempt, but the part of the right of way which was acquired from private owners and not from the United States was not exempt. It must be admitted that in the above ruling this court has gone to the utmost limit, as will be readily seen by comparison with the decision in *Providence Bank* v. *Billings*, 4 Pet., 514, wherein was first announced by the Great Chief Justice the rule that an exemption from taxation would not be inferred from the fact that the charter contained no stipulation on the subject of taxation. A different question is now involved—was the right of way in question granted by Congress or not?

No part of the right of way in Valencia County was, however, acquired from private owners. At all times has this right of way been claimed by the railroad company under section 2 of the act of Congress, hereafter set forth. (Tr., pp. 212, 214, 217, 227, 232, 252, 259, 274, 277.)

The question now is not one of construction of the ex-

emption clause, but it is to be determined what part of the right of way could be successfully claimed as being granted under section 2 of the act of Congress; and the same rule of construction to determine what was so granted must be applied in this case as would be applied in a controversy between the railroad company and a private indvidual, in an action involving title to its right of way. It cannot be made fish for one purpose and fowl for another. Upon the question now involved as to what was granted under section 2 of the Atlantic and Pacific act, the rule is well settled in this court that the grant of right of way should be liberally construed so as to cover all lands or right of way which the United States had power to grant at the time of the passage of the Atlantic and Pacific act, and which would therefore include the right of way over all lands which the United States had the power at the time to dispose of. (See *United States* v. *Denver & Rio Grande Railway Company*, 150 U. S., 1.) There can, however, be no serious question as to the intent of Congress in respect to the extent of the grant. It would be a breach of good faith if the government were now to resort to a strained construction to defeat any portion of the grant intended to be made. It would not only be bad faith but bad morals to now by a strained construction defeat or curtail any part of a grant manifestly intended by Congress, after vast sums have been expended and after the government has been receiving for years the benefits and advantages of the railroad as a postal and military route stipulated for in this very grant. Some other department than the judiciary should be asked to perpetrate such a wrong.

Section 2 of the act of July 27, 1866, entitled "An Act granting lands to aid in the construction of a railroad and

telegraph line from the States of Missouri and Arkansas to the Pacific coast" (14 U. S. Stat. at Large, 292) provides:

"That the right of way through the public lands be, and the same is hereby granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed, and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of 100 feet in width on each side of said railroad where it may pass through the *public domain*, including all necessary grounds for station-buildings, workshops, depots, machine-shops, switches, side-tracks, turntables and water-stations," etc.

Section 3, which contained the grant of lands to aid in the construction of the railroad, granted

"Every alternate section of public land, not mineral, designated by odd numbers to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections per mile on each side of said railroad whenever it passes through any state and *whenever, on the line thereof, the United States have full title, not reserved*, sold, granted, or *otherwise appropriated*, and free from pre-emption or *other claims or rights*, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers."

It is obvious from the foregoing that the right of way was intended to be granted over all lands which were con-

sidered or regarded at the time as a part of the "*public domain*," whether such lands were or should be thereafter reserved or otherwise appropriated. Indeed, in respect to the right of way, the government intended to grant such right of way wherever it possessed any title or wherever it had the power of disposition. If this were not the intention, certainly some reservation, such as is found in section 3, would also have been placed in section 2 as a limitation upon the grant of right of way. This construction has been definitely settled by this court in several cases.

In *Railroad Co.* v. *Baldwin*, 103 U. S., 426, on pages 429 and 430 it was said in respect to a similar grant, as follows:

"But the grant of the right of way by the sixth section contains no reservation or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby.

"The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would often be imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given; but for the loss of the right of way by these means, no compensation is provided, nor could any be given by the substitution of another route.

"The uncertainty as to the ultimate location of the line of the road is recognized throughout the act, and where any qualification is intended in the operation of the grant of lands, from this circumstance, it is designated. Had a similar qualification upon the absolute grant of the

right of way been intended, it can hardly be doubted that it would have been expressed. The fact that none is expressed is conclusive that none exists."

The above noted distinction between a grant of the right of way over the public domain and of lands to aid in the construction of the road was also pointed out in *Bybee* v. *Oregon* and *California Railway Company*, 139 U. S., 679 and 680.

In *Missouri, Kansas and Texas Railway Company* v. *Roberts*, 152 U. S., 114, it was held that the act of Congress granting the right of way to the company subsequently known as the Missouri, Kansas and Texas Railway Company across the "public lands" in Kansas attached over lands in the Osage Reservation; that while the right of occupancy was in the Indians, yet the absolute fee or legal title remained in the government, and, therefore, the power to make the grant over such lands existed.

Mr. Justice Brewer held, in the case of *U. P. Ry. Co.* v. *Douglas County*, 31 Fed., 540, that under a similar act of Congress the Union Pacific Railway Company obtained a right of way over sections 16 and 36, the school sections which had theretofore been reserved by Congress in creating the Territory of Nebraska and which it was intended should be given to the future State of Nebraska.

He also states as a significant fact that the right of way through the school sections had been accepted without challenge for twenty years, and says: "This indicates the general understanding and is significant." The same is true with respect to the right of way in question over the alleged Spanish or Mexican grants.

This Congressional grant is a law as well as a conveyance.

When the location of the right of way was made the title thereto took effect by relation as of the date of the act.

M. K. & T. Ry. Co. v. *K. P. Ry. Co.*, 97 U. S., 497.

K. P. Ry. Co. v. *Atchison Co.*, 112 U. S., 417.

The Atlantic and Pacific Railroad Company was incorporated under the act of Congress approved January 27, 1866. Prior to March 12, 1872, it definitely located its line of railroad through Valencia County, and on March 12, 1872, filed with the secretary of the interior of the United States a map showing its line of definite location through the Territory of New Mexico. (Tr., p. 212.)

At that time there was no survey of lands made by the government or anybody else. No part of the right of way, when located, passed through cultivated, enclosed or occupied lands in Valencia County, except some small tracts cultivated by Indians in the Pueblos of Laguna and Acoma, hereafter noticed. (Tr., p. 212.)

In 1866 the interior department printed and published two maps, one of which purported to be a sketch map of public surveys in New Mexico and Arizona, the other a map of the United States and Territories, showing the extent of public surveys and other details. (Tr., p, 213.)

The railroad was built on the line of definite location through Valencia County in 1879 and 1880. (Tr., p. 213.)

It is apparent that about the time of the location of the line of road through Valencia County, from the communications of the interior department, that the lands through which the road was located in said county were regarded as part of the public domain. (See Tr., pp. 212-217.)

The railroad company at no time acquired title from private parties through purchase or condemnation, but has

at all times considered its title in Valencia County as derived under the grant in the act of Congress. (Tr., p. 286.)

As the line of road in Valencia County runs through several alleged Spanish or Mexican grants, the titles to which were subsequently confirmed and surveys thereof made, either under an act of Congress or some decree of the Court of Private Land Claims, it will be necessary to examine each particular grant to determine whether in each particular case at the time of the passage of the Atlantic and Pacific act or location of the right of way the alleged Spanish or Mexican grant had been perfected and the land segregated from the public domain. The decision of the Court of Private Land Claims upon any such title is of course in no sense conclusive or binding upon the railroad company or even relevant in this controversy, being *res inter alios acta*. By the very terms of the act creating the Court of Private Land Claims its decision is only binding as between the claimant therein and the United States. The decree of the Court of Private Land Claims has simply the effect of passing the title of the United States to such claimant at and as of the date of the decree entered, or survey made thereunder.

Joaquin Sedillo and Antonio Gutierrez Grants.

The railroad upon crossing the line between Bernalillo and Valencia Counties going west was located and built on land claimed under two Spanish grants, now known as Joaquin Sedillo and Antonio Gutierrez grants. The grant papers pertaining to each of the above named grants were a part of the archives of the government of Spain, received by the government of the United States from Mexico and in the custody of the surveyor general of New Mexico ever

since the organization of his office in 1855, but were never presented to the surveyor general of the Territory of New Mexico or filed or recorded in any public office in the Territory of New Mexico, except as aforesaid, prior to September 9, 1896, when a petition was filed in the office of the clerk or the Court of Private Land Claims, at Santa Fe, New Mexico, by the claimants to the land, of each grant separately against the United States. (Tr., p. 217.)

The petition in the Court of Private Land Claims was filed by J. Francisco Chavez. It states that on November 5, 1716, Captain Antonio Gutierrez presented to Felix Martinez, Governor and Captain-General of New Mexico, his petition asking for a grant of a piece of land below Isleta, and apparently at a distance of two leagues, which formerly had been held by Christobal de Tapia, and setting forth that the boundaries of said land "were on the north an arroyo de alamos, which comes down from the hills; on the south, the Pueblo of San Clemente; on the east, the Rio Del Norte, and on the west the hills of the Rio Puerco"; that on the same day and year said governor made to said petitioner the grant he asked for, and as Christobal de Tapia formerly enjoyed it and directed Captain Beltazar Romero to place the said petitioner in possession; that Gutierrez entered into possession and that there are no *persons in possession* of said land *or any part thereof* claiming adversely to the petitioner; that it is impossible to state even approximately the quantity of land embraced in said grant, *as no survey thereof has ever been* made, but it is estimated to be between fifteen and twenty thousand acres; that no claim for said grant was considered or acted upon by Congress or the authorities of the United States, or heretofore been submitted to the authorities constituted by the law for the adjustment of land titles within the

limits of New Mexico; that the arroyo del alamos cannot now be identified if it still exists. (Tr., pp. 218–221.)

Copy of the petition of Gutierrez and the alleged grant are set out on transcript pages 219 to 220.

Gutierrez' petition to the governor recites that he is a resident of Albuquerque; that, being very much in need of lands on which to plant in order to support his family and *also to the end that his sheep may have room to scatter out*, and there being an uncultivated and unoccupied tract of land below Isleta, apparently at a distance of two leagues, which formerly was held by Christobal de Tapia, he asks a grant *in the same manner as it was held by said Tapia*, and that real possession be given to him, designating the boundaries and landmarks. In a note to the petition he describes the boundaries as follows: "On the north an arroyo with some cottonwood trees that comes down from the hills, on the south the Pueblo of San Clemente, on the east the Del Norte river, and on the west the hills of the Puerco river." This is followed by the alleged grant or decree by Martinez, which relates that it (the foregoing document) was presented by the party therein named; that he treated it as properly presented in accordance with law, and in view of the fact that it is his Majesty's will that his land should be settled and fortified, in his royal name he makes the petitioner "the grant that he asks for, as he describes it and as Christobal de Tapia formerly enjoyed, without prejudice to a third party who may have a better right," and he commands Captain Baltazar Romero to place petitioner in real possession, and when these proceedings shall have been had he *will transmit this grant and possession to the civil and military secretary, in order that he make a certified copy thereof.* (Tr., p. 221.)

These are all the grant papers. No document showing the putting in juridical possession and defining the boundaries is produced.

There was also filed in the Court of Private Land Claims another petition by J. Francisco Chavez, which stated that at some time in the early part of the eighteenth century a grant was made by the proper authorities of Spain to Joaquin Sedillo which lies immediately south of the lands of the Indian Pueblo of Isleta, and was bounded on the north by the line of the league of said pueblo, on the east by the Rio Grande, on the south by a twin alamo called by some the alamo de la culebra, and on the west by the ceja of the Rio Puerco; but the original grant papers evidencing the said grant have been lost or destroyed and cannot now be produced. The fact of the existence of the said grant is, however, shown by papers, which constitute a portion of archive 178, in the office of the surveyor general for New Mexico; that from the time of the making of said grant said Sedillo and his successors in title have been in peaceable possession of the land within said grant; that there are no persons claiming any part thereof adversely to the petitioner; that said land is situated in Valencia County, and the boundaries thereof are as hereinafter set forth; but it is expressly averred that the eastern boundary refers to the old river bed of the Rio Grande, which is about two miles further east than the present river bed; that it is impossible to state even approximately the quantity of land embraced in said grant, as *no survey thereof has ever been made*, but it is estimated to be between ten and fifteen thousand acres. The southern boundary has been completely destroyed and its location cannot be identified with certainty. No claim for said grant has been considered or acted upon

by Congress or the authoritities of the United States, or has been submitted to the authorities constituted by law for the adjustment of land titles within the limits of New Mexico. (Tr., pp. 217–219.)

No copies of grant papers are attached to this petition, so that there is really no relevant evidence of any such grant in this record.

The Court of Private Land Claims considered the two cases together, confirming both grants but defining the limits. (See its judgment, pages 221 to 227, inclusive.)

The confirmation is based upon the law of prescription and rather upon length of possession than upon the fact that the documents showed a complete title from the Spanish government. (See Tr., p. 222.) And it is decreed that the claim "for so much of said land as lies between the old and the present river beds of the Rio Grande del Norte, commonly known as the Bosque de los Pinos," is confirmed to Chavez, and that so much of the land as lies west of the present river bed of the Rio Grande del Norte is confirmed to the Pueblo of Isleta. The court then defines the boundaries of the lands claimed, as follows: "On the north by the southern line of the pueblo grant to the Pueblo of Isleta, as surveyed under the confirmation of the same by the Congress of the United States; on the east by the old river bed of the Rio Grande del Norte; on the south by the north line of the grant to Ana de Sandoval y Manzanares, as established by the decree of this court in the case of *J. Francisco Chavez and Solomon Luna* v. *United States*, No. 64 on the docket of this court; and on the west by the ceja (being the divide between the Rio Puerco and the Rio del Norte) of the Rio Puerco; and that the area of the said land is estimated to be between thirty and thirty-five thousand acres."

The railroad right of way crossing these two grants in a south-westerly direction crosses the north and south line as subsequently established. The length of the right of way over the two grants is about four miles. Prior to the filing of the petition in the Court of Private Land Claims, no one, including the owners of the grants, knew of their existence except that in the trial of the San Clemente case in the Court of Private Land Claims the government found and produced in that case the archives tending to show these two grants. Prior to the decision of the Court of Private Land Claims no one could have determined where the north and south line of said grants or either of them was located, or the width of them, or either of them north and south, except that the north line was the south line of the previously surveyed and patented Isleta Pueblo grant, and the south line was the north line of the San Clemente grant as subsequently confirmed by the Court of Private Land Claims. (Tr., p. 227.)

Prior to the decision of said court there never was any segregation of the land contained in these two grants from the lands of the United States, or from the lands of anyone else, except as may be claimed from the foregoing. (Tr., p. 227.)

Lands embraced within the foregoing grants were not segregated from the public domain until confirmation by decree of the Court of Private Land Claims. Until then Congress could have granted a right of way over said lands because such lands until segregated continued to be a part of the public domain. These Spanish grants were incomplete and imperfect and the descriptions were vague and indefinite.

Upon the acquisition by this government under the treaty with Mexico, of territory embracing New Mexico,

Arizona and California, this government succeeded to the sovereign rights of old Mexico over the lands. Where under the former governments the title to the grant was incomplete, inchoate or the description uncertain and indefinite, the land still remained in the control and disposing power of the government and as part of the domain of the government. Therefore, the Supreme Court of the territory had just previous to its decision in this case held that a mining claim might be located upon such grant. (See *Lockhart* v. *Wills et al.*, 54 Pac., 336.)

In *Apis et al* v. *United States*, 88 Fed., 931, it was held that a patent issued under an act of Congress granting to the Mission Indians a portion of the land embraced within a Mexican grant was valid, and withdrew the land so granted from the operation of a former act of Congress permitting the legal representatives of Apis, the original holder of the Mexican grant, to litigate in the United States District Court their claim to such lands.

In this case it was stated that Congress had power to dispose of land embraced within a Mexican claim under judicial consideration. (See pages 935, 936, 937.)

See

Delauriere v. *Emison*, 15 How., 535.

See, also, *Botiller* v. *Dominguez*, 130 U. S., 238, 255 and 256, wherein it was held that no title to land in California dependent upon Spanish or Mexican grants can be of any validity which has not been submitted to, and confirmed by, the board provided for that purpose under the act of 1851, or, if rejected by that board, confirmed by the District or Supreme Court of the United States. In other words, this government obtained sovereignty over all the property acquired by treaty from Mexico, and, as such, the

proprietorship to or dominion over the land therein; and might disregard, if it chose, its obligation to respect the grants made by the former governments, and some law was necessary as well as some action to be taken to divest the title of this government in respect to any portion of the lands.

In view of the peculiar nature and character of these grants, Congressional action has been deemed necessary to convey and release the title to this government to the claimants of such grants. Until such action has been taken this government has assumed the power and right to dispose of any portion of said lands, regarding them as still a part of the public domain. Therefore, in the 8th section of chapter 103, approved July 22, 1854 (10 U. S. Stat. at Large, p. 308), the office of surveyor general of New Mexico, Kansas and Nebraska was established, and it was made his duty to ascertain "the origin, nature, character and *extent* of all claims to lands under the laws, usages and customs of Spain and Mexico." He was required to give notice, summon witnesses, etc., to ascertain the facts and to make a full report on all such claims as originated before the cession of the territory to the United States, denoting the various degrees of title with his decision as to the validity or invalidity of each of the same; also to make report of all pueblos, showing the *extent* and locality of each, etc., which report should be laid before Congress for such action thereon as might be deemed just and proper. It was then for Congress to confirm or disaffirm such grants. No steps were taken under this act to have these grants confirmed.

This act was finally superseded by the act approved March 3, 1891, creating the Court of Private Land Claims.

(Chap., 539, 26 U. S. Stat. at Large, 854.) Section 6 of that act authorizes claimants of imperfect or inchoate titles to institute a suit to have the same confirmed in accordance with the principles announced in section 7 of the act. It required the claimant in his petition, among other things, to state the name of any person in possession of any part of the land otherwise than by lease or permission of petitioner, and serve a copy of such petition on such adverse possessor. This was not done.

Section 8 authorizes the holder of a complete and perfect title to make application to have the validity thereof determined, and where such title should be confirmed and established, the confirmation should be for so much land as such perfect title shall be found to cover, "always excepting any part of such lands that shall have been disposed of by the Untied States, and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to the holder of any such claim or title." The confirmation should only have the effect to release all claim of title by the United States.

Section 10 provides for a survey upon confirmation.

Under section 13 no claim was to be allowed which interfered with or overthrew any just and unextinguished Indian title or right to any land or place. It was also provided that no decree should conclude or affect rights of persons as between each other. The decree should only operate against the United States as a release by the United States of its rights and title to the land confirmed; that no imperfect claim should be confirmed for more than eleven square leagues.

In section 14 it was provided that if it should appear that any part of the lands decreed to any claimant have

been sold or *granted* by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decrees, etc. This shows that this government asserted the right of disposition notwithstanding the existence of such claims.

The foregoing grants were both imperfect. The records in the archives of Mexico, if any, and such as they were, show no final segregation or passing of title to these lands. The decree or presentation papers signed by the governor in respect to the alleged Gutierrez grant was a mere preliminary order to the proper officer to put the petitioner in possession of such lands as should be vacant and unoccupied. It was necessary that juridical possession be given and a record of the officer fixing the boundaries or making a survey of the claim was essential.

In *United States* v. *Elder*, 177 U. S., 117, the following language is quoted with approval:

"Under the civil, as at the common law, a formal tradition or livery of seisin of the property was necessary. As preliminary to this proceeding the boundaries of the quantity granted had to be established, when there was any uncertainty in the description of the premises. Measurements and segregation in such cases, therefore, preceded the final delivery of possession."

In *Menard's Heirs* v. *Massey*, 8 How., 293 and 310, the manner in which a complete title under the Spanish government was executed is given. This showed as the final document the survey. On page 306 it is said:

"Petitions were written by the party asking the land, or some one for him; the governor consented usually by endorsement on the petition, and ordered that the petitioner should have the land and directed that it should be surveyed; the paper was handed to the petitioner, who might deliver it to the surveyor, or omit it; if he presented it, and the land was laid off, then it was the surveyor's duty to record both the concession and plat,

together with the *process-verbal*. But this did not make the party owner; without the further act of the King's deputy—the intendent-general—the title still continued in the crown."

Moreover, in the case of *Chavez* v. *United States*, 168 U. S., 177 and 188 (citing among other authorities the Royal Order of 1754), it was laid down that by the Spanish law in force long prior to 1788 lots and lands were distributed to those who were intending to settle, and it was provided that "when said settlers shall have lived and labored is said settlements during the space of four years, they are hereby empowered, from the expiration of said term, to sell the same, and freely to dispose of them at their will as their own property." But confirmation by the audiencia, or the governor, if recourse to the audiencia was impracticable, after the four years had elapsed, was required in completion of the legal title.

This is apparent in respect to the Gutierrez grant, inasmuch as he states in his petition that the lands were formerly held by Christobal de Tapia, who had evidently forfeited his rights, and the petitioner was seeking title in the same manner. But there is no record to show a subsequent confirmation of his title, or settlement for the requisite period.

Moreover, in *Bergere* v. *United States*, 168 U. S., 66, on a petition to the governor of New Mexico for a grant of public land, the governor directed possession to be given by the alcalde, and the expediente to be transmitted by that officer to the office of the governor, so that, if approved, the proper testimonio might be ordered to be given to the petitioner. It was held that no grant was made until return should be made by the alcalde, and until his action should be approved by the governor it was without effect.

In that case some reliance was placed to show a grant upon the long continued possession by the alleged grantee, which possession was attempted to be shown from pasturing of stock upon the land; but as it did not appear that such possession was *exclusive*—that no other parties pastured their stock upon the lands, from which it might appear that such possession was exclusive—the evidence was held insufficient to show a title by prescription.

But over the lands in question, owing to the peculiar nature of the grant, the government of Mexico would undoubtedly have had the power to grant a right of way. The petitioner asks for a grant of lands on which to plant and also for pasturage purposes, "to the end that his sheep may have room to scatter out," and the claim under this grant is made for some ten or fifteen thousand acres. It cannot be supposed that the government intended to grant in fee simple such a large amount of land to a single individual. The grant was asked mainly for the purpose of permitting grazing. The governor ostensibly grants the land "as Tapia formerly enjoyed it," "without prejudice to a third party." At most the usufruct was granted, but the government still retained the power and right to grant portions of the land for other purposes. The grant of a right of way thereover would not materially interfere with the enjoyment of the land for pasturage purposes.

Thus, in *Zia, Pueblo of* v. *United States*, 168 U. S., 198 and 206, it is shown that the concession of a great extent of land for rearing and pasture of cattle constitutes no more than the usufruct of it, for the time agreed upon, but the grantee has not, nor never had, the most remote right to solicit the proprietorship, for there was no law or regulation upon which to found it, and consequently the land does not go

out of the class of public lands, since it is the same as if it were held on rent.

A similar ruling was made by Surveyor General Julian in regard to another grant found in this record. (See Tr., pp. 243–246, inclusive.) He refers to White's collection of Civil Laws of Spain and France, Vol. 2, page 287, and Vol. 1, page 57.

In order, however, to segregate the land from the public domain the title must not only be perfect and complete but the description therein must be so definite and certain as to be readily ascertainable, leaving nothing to doubt or conjecture. The Court of Private Land Claims found it necessary to fix the north and south lines with respect to the lines of other grants as confirmed by it, and it was admitted that no survey of the lands had ever been made prior to the location of the railroad. A survey was necessary to effect a segregation from the public domain.

Stoneroad v. *Stoneroad*, 158 U. S., 240, 247, 248 and 251.

In *Carpentier* v. *Montgomery et al.*, 13 Wall., 480, it was held that where a Spanish or Mexican grant does not identify the precise tract of land granted, the title is an imperfect one, needing the further action of the United States government to make it perfect. That such is the case where one side of the tract is undefined, or one of the exterior boundary lines cannot be located. An authoritative survey is required to demonstrate the particular tract granted. It was also held that the confirmation of such a grant segregates the land from the public domain only when surveyed.

See, also,

Scull v. *U. S.*, 98 U. S., 410, 419.
Pinkerton v. *Ledoux*, 129 U. S., 346.

In *Dauterive* v. *United States*, 101 U. S., 705, it is said:

"Under our treaty of cession the United States acquired in sovereignty all the lands in the province which had not before been granted by one or the other of the two prior sovereigns and severed as private property from the royal domain. * * * That the title must be complete under the former sovereign, that is, the land must have been identified by an actual survey with metes and bounds, or the description in the grant must be such that judgments can be rendered with precision by such metes and bounds, natural or otherwise; that nothing must be left to doubt or discretion in its location; and if there was no actual survey previously made which a surveyor can follow, there must be such a description of natural objects for boundaries that he can do the same thing *de novo*, or, in other words, the separation of the tract from the public domain must not be a mere conjectural separation, but complete without any element of discretion or uncertainty. *Scull* v. *United States*, 98 U. S., 410, 418; *Smith* v. *United States*, 10 Pet., 326, 334."

See, also,

Doe v. *Higgins*, 39 Ala., 19.
LeDoux v. *Black*, 18 How., 473.
United States v. *King*, 3 How., 773, and
Muse v. *Arlington Hotel Co.*, 68 Fed., 644.

The description in the petition for a grant is of the most vague and general kind. There is no document showing a description of the land in which the petitioner was put in possession, neither were the lands actually enclosed.

In *McGuire* v. *Tyler*, 8 Wall., 651, on page 660 it is said:

"Where the documentary evidences of title produced by the claimant contain no sufficient lines or boundaries to show that any definite and distinct parcel of land was severed from the public domain, the universal rule as settled by repeated decisions of this court is that the concession in such a case creates no right of private property in any particular tract of land which can be maintained in a court of justice without an antecedent survey and location."

The right of way being located under a grant of Congress, the title thereto must prevail over an alleged incomplete Spanish grant though subsequently confirmed.

In *Trenier* v. *Stewart*, 101 U. S., on pages 801 and 802, Mr. Justice Clifford said:

"Concessions of the kind having never received the sanction of the supreme power of the province, they did not have the effect to segregate the tract conceded from the mass of the public lands, from which it followed that when the jurisdiction of the province was transferred by the treaty the legal title to all such tracts vested in the new sovereign until confirmed."

In *McCabe* v. *Worthington*, 16 How., 86, it was held that a decree, confirming an inchoate Spanish title, made by this court on appeal in 1836, upon a petition originally filed in 1824, did not relate back so as to divest a title gained from the United States under an entry of public lands made in 1834.

The title takes effect only from the date of confirmation and survey. (See *Dent* v. *Emmeger*, 14 Wall., 308 and 313.)

In *Menard's Heirs* v. *Massey*, 8 How., 293, it was held that an incomplete Spanish title, confirmed by Congress in 1836, cannot prevail against a patent for the same land issued before the act of confirmation.

It was also held in that case that the provision contained in the tenth section of the act of March 3, 1811, reserving from sale tracts of land, the claim to which has been presented to the recorder, etc., does not apply to an unreserved claim, the boundaries of which are not ascertainable from the calls in the concession.

In *Willott* v. *Sanford*, 19 How., 79, there were confirmations of conflicting Spanish grants by Congress, and it was

held that the prior confimation and survey must prevail—also, that there must be such a definite description as will identify the land with certainty and segregate it from the public domain.

Therefore when the description is indefinite or uncertain, although the grant may be confirmed by Congress, the land is not segregated from the public domain until a survey be made and approved. (See *LeDoux* v. *Black*, 18 How., 473 and 475; *LeCompte* v. *United States*, 11 How., 115, 125, 127; *Dent* v. *Emmeger*, 14 Wall., 313.)

Four miles of right of way over these two grants was exempt from taxation.

San Clemente Grant.

Upon crossing the foregoing grants the right of way is over a portion of an alleged Spanish grant, known as the San Clemente grant, for a distance of ten and five-tenths miles. (Tr., p. 227.)

The right of way crosses the north, south and west lines of said grant. A copy of said grant was filed in the office of the surveyor general of New Mexico, May 30, 1855, and is as follows (Tr., pp. 228, 229):

Petition of Ana de Sandoval y Manzanares, to the governor and captain general, reciting that when the former governor brought them hither for settlement he promised to give to each one of the native citizens of the province who might come to settle and pacify the same the tracts of lands and fields and stock-raising ranches that they abandoned in the year '80 on account of the powerful insurrection. That by virtue of having been restored to said province, suffering thereby a great many hardships and finding herself really poor and a widow of Blas de la

Candalaria, deceased, and burdened with children, a good reason to supplicate that he grant her in the name of His Majesty "a tract of land called San Clemente, which I inherited from my father, deceased, Mateo de Sandoval y Manzanares, who left me the grant of said rancho, with its boundaries as follows: On the northern part with the lands of Christobal de Tapia, and on the southern part with the lands and walls of the house of Tomo Domingues; on the eastern part with the Del Norte river; on the part of the west with the Rio Puerco," and she asks that she may be placed in royal possession of said tract, together with the new grant.

This is followed by the presentation and decree signed by Phelix Martines, reciting that in the City of Santa Fe, on the 13th day of July, 1716, the petition was presented by the petitioner; that he treated the same as in due legal form, and in view of the justness of the petition, said lands belonging to her father, according to her petition, and the same having been abandoned by him on account of the insurrection in the year '80, he concedes to her "the grant she asks" to the aforesaid, "her children, heirs and successors, that she may enjoy and hold the same; *provided that it be without injury to any third party, who may have a better right*; and she must settle the said grant within six months on account of the many occupations of the time." Then he commands Captain Antonio Gutierrez to place her in royal possession, and that this decree shall be for her a sufficient title; and as soon as said possession is given her, this original may be returned to this office and a duplicate may be made.

This is followed by a document signed by Antonio Gutierrez, reciting that on the 23rd day of July, 1716, he, as alcalde, in compliance with the above decree, went to the

tract and lands in said decree and gave royal possession to Felix de la Candelaria, in the name of his mother, Ana de Manzanares y Sandoval, in legal form, with the accustomed ceremonies, etc., and describes the following boundaries: "On the east by the Rio del Norte, on the west by the Rio Puerco, on the south by the house of Tome Dominguez, and on the north by a ruin that is a little above the Pueblo of San Clemente; and in the said boundaries I ordered mounds to be made, having first examined them, and I signed it with two attending witnesses," etc. (Tr., p. 228.)

On November 18, 1871, the surveyor general of the Territory of New Mexico approved said claim, and on December 18, 1872 (after location of the right of way), transmitted the same, with his approval, to the commissioner of the general land office. In 1873 the report of the surveyor general was transmitted to Congress by the secretary of the interior, and in April and May, 1878, a preliminary survey was made under the direction of the surveyor general. On November 5, 1886, the then surveyor general of the Territory of New Mexico decided that while the Spanish grant papers were genuine, yet the claim should be rejected for other reasons, and so reported to the commissioner of the general land office, and his report was transmitted to Congress. No action was ever taken by Congress. Afterwards the claimants of said grant presented a petition to the Court of Private Land Claims at Santa Fe, New Mexico, to have the grant confirmed against the United States, and on September 4, 1896, a decree was entered by said court confirming said grant. (Tr., pp. 230, 231.)

The decree of confirmation is found on transcript pp. 230, 231. In the decree the court fixes and settles the boundaries of the tract confirmed. The estimated area is about 37,000 acres. (Tr., pp. 230-231.)

Prior to the survey made under this decision of the Court of Private Land Claims in said cause, no one could have determined, actually, where the line of railroad entered into or passed out of this grant, or how much mileage there was over lands belonging to this grant. While some portions of this grant were occupied by the owners of interests in it, yet none of the portions covered by the right of way of the railway company were occupied, or cultivated, and the owners claimed the north line to embrace lands contained in the two grants heretofore stated, and the survey of 1878 was in accordance with that claim. At the time of the location of the right of way of the railway company over the lands contained in this grant the walls of the house of Tome Dominguez were not in existence and the line between said grant and the lands that were owned by Cristobal de Tapia prior to 1716 was undetermined, with nothing to mark its existence on the grant or elsewhere. (Tr., p. 282.)

Prior to the decision of the Court of Private Land Claims in this case, it would not have been possible for anyone to have actually determined how many miles of the right of way of said railroad was located on lands covered by said grant, or where said right of way crossed the exterior lines of said grant. (Tr., p. 232.)

At the date of the passage of the Atlantic and Pacific Railroad act, and, indeed, at the date of the location of the right of way, the land covered by this grant was not segregated from the public domain and therefore remained a part thereof.

The title was incomplete because there was no subsequent confirmation and no record to show that the petitioner had remained in possession the requisite length of time as required by the decision in the case of *Chavez* v.

United States, 168 U. S., 177, 188. It is apparent that something of this sort was necessary from the papers in this case, inasmuch as petitioner asks for a new grant of lands which had been formerly occupied by her father, but abandoned by him on account of the insurrection.

The description, however, was too indefinite and uncertain to segregate the lands from the public domain. This segregation was effected by the act and documentary evidence made by the alcalde after putting the petitioner in possession. The preliminary decree is of no defined tract, but, on the contrary, "is without prejudice to the rights of other parties." It directs the alcalde to ascertain whether any third party be in possession of any portion of the lands, and to give possession to only that part which is unoccupied. It also requires possession to be taken within six months. It was the duty of the alcalde, therefore, to fix the boundaries, and, by his record, to definitely segregate the lands from the public domain. Such segregation, within the decisions heretofore cited, was not accomplished by fixing as the northern boundary of a tract of land consisting of over thirty-five thousand acres "a ruin that is a little above the Pueblo of San Clemente," and the southern boundary as "the house of Tome Dominguez." It is essentially lacking in enclosing lines or boundaries. A ruin or a house may furnish a starting point or a corner; but it cannot be a definite boundary or enclosing line to such a large tract. (*Carpentier* v. *Montgomery*, 13 Wall., 480, and cases heretofore cited.)

Ten and five-tenths miles of right of way through this grant, as subsequently confirmed and surveyed, was therefore exempt from taxation.

NICHOLAS DURAN DE CHAVES GRANT.

The right of way crosses from the San Clemente grant aforesaid into another alleged Spanish grant known as the Nicholas Duran de Chaves grant, crossing the north line of said grant as recently established, and re-crossing again into the San Clemente grant, being two and one-fourth miles within the Nicholas Duran de Chaves grant, as finally confirmed and established. (Tr., p. 232.)

On April 11, 1877, long after the location of the right of way, a petition was presented to the surveyor general of New Mexico on behalf of the alleged legal representatives of Nicholas Duran de Chaves. (See Tr., pp. 232–235.) It set forth that in 1739 Nicholas de Chaves, known also as Nicholas Duran de Chaves, petitioned Governor Mendoza of New Mexico for a tract of unoccupied and uncultivated land; that such petition was approved and the alcalde directed to put Chaves in possession, with designation of the boundaries, which was done, and that on October 6, 1743, Mendoza reaffirmed the grant with boundaries as originally made; that in 1749 the lieutenant governor of New Mexico in a controversy fixed the boundaries between said lands and the community of Belen; that the amount of land claimed is not known, as no survey has ever been made of the grant; that most of the lands embraced within the limits of said grant have been surveyed by the government of the United States, and they appear as public lands open to settlement on the official plats of the survey of said lands. Claimants requested that action be taken as required by the act of 1854, to withdraw such lands until final action be taken by Congress. It then sets out sections and parts of sections surveyed as public lands.

With said petition the following grant papers were presented to the surveyor general:

Petition of Don Nicholas Duran de Chaves, to the governor, stating that in the preceding year, 1738, the preceding governor, having passed through Albuquerque, he petitioned for an uncultivated and unoccupied tract on the banks of the Del Norte river, "as I have some large and small stock without having a reasonable place to keep them except with injury to my neighbors and the Pueblo of Isleta"; that he was ordered to remain on the tract until the succeeding governor should arrive, and he therefore asks such governor for a grant of said tract bordering on the Del Norte river, the boundaries of which, on the east side, look upon said river, upon that of the west the Rio Puerco river, upon that of the north the lands of Captain Bernabe Baca, and upon that of the south it fronts upon the ponds which are called San Pablo's; that he entered upon it at the risk of his life and *fitted up a hut and put his stock upon it*, and has maintained himself there ever since, and he asks that the alcalde shall put him in possession under the formalities prescribed by law.

This is followed by a document signed by Governor Mendoza, reciting that at the Town of Santa Fe, June 1, 1739, said governor having examined the petition and treated it as presented, and in view of what is contained in said writing set forth, makes to him the grant in the name of his majesty, of the tract of land which he asks for, for him, his children, heirs and successors, who may have the better right, in virtue of representing that it is without injury to a third party, with the conditions and provisions that he is to keep them as his majesty commands in his royal orders; and in virtue of said grant the chief alcalde

of Albuquerque shall place said Chaves in possession, "designating to him their boundaries."

This is followed by a document signed by the Alcalde Juan Gonzales Bas. It recites that at the place of the San Pablo ponds, on the 26th of August, 1739, said alcalde, "in virtue of the *decree* enacted" by Governor Mendoza, which decree was made known by him to the residents and adjoining owners to said lands, concerning which finding only slight controversy on account of it not being known by him or those persent which was the house of Tome Dominguez, which boundary said Nicholas Chaves mentioned in that which he asks for, and not being certain which was the house or walls which said Chaves asked for as a line or boundary, and Captain Bernabe Baca alleging and saying that possession was given to him at a house and walls which is that which he has for boundaries of the lands that he possesses, and each one alleging that he has the right of property to said boundaries, one because possession was given him therein, and the other asking as far as said house as a boundary, and there being a controversy between the two on account of there being two houses without any title whatever, within the distance of a league, and each one above and below wishing to appropriate it as his own, said alcalde, on account of the doubt and not being certain which of the two houses really is the one that belonged to Tome Dominguez, and by agreement of the two contestants, it was decided to give the possession by the lands joining each other at a point half way between the two houses; wherefore, a little round pond with some water and grown up with rushes was designated to him as a boundary and division of tracts. This serves as a boundary to said Bernabe Baca on the south side, and to said Nicholas

de Chaves it serves as a boundary on the north side; and not finding any other controversy, he proceeded to give the possession; and having travelled about four leagues, arrived at the boundary of the said place of the San Pablo ponds, where in the presence of attending and instrumental witnesses, as required by law, he gave his hand to said Chaves and conveyed over to him his lands, etc., fixing the boundaries as follows: "On the east side of the Del Norte river; on that of the south the San Pablo ponds; on the west with the Puerco river; and on the north by the one I have referred to as between the two houses, which is the little pond grown up with rushes on which I ordered mounds to be placed to perpetuate their memory, and it was given *free and general*, with pastures, watering places, woods and uses and customs," etc., part of the document being obliterated.

Upon this is a marginal note as follows:

"Santa Fe, September 30, 1739.

"This royal title is noted in the government book which is kept in the archive of this capital in order that it may appear of record when needed.

MENDOZA."

Also:

"Santa Fe, October 6, 1743.

"In this grant the boundaries are to be recognized as those therein mentioned, and they are the same which should be recognized by said grant, and its owner, who is Don Nicholas de Chaves, *it being understood that in this, as well as the other grants, the pastures, entrances and exits and water holes are common*, with the exception of cultivated lands, corrals and the rest that may be to the grave injury of the owner, and I signed it in order that it be observed.

GASPAR DOMINGO DE MENDOZA."

(Tr., p. 237.)

This is followed by a document, considerably mutilated, of the lieutenant governor, fixing the boundary between the

grant of said Chaves and the community of Belen. Then follow some documents relating to a controversy between said Chaves and Baca. (Tr., pp. 237–238.)

On December 16, 1887, Surveyor General Julian recommended confirmation of the grant only as to the cultivated lands, which was to be ascertained and surveyed, but not as to lands held for pasturage purposes. His opinion is found on transcript pages 243 to 247.

He finds that there is no record of the grant among the archives of New Mexico; that on the contrary the grant and act of possession with other papers pertaining to the claim were kept in the private custody of the grantee and his heirs until they were filed in the office of the surveyor general of New Mexico, on April 11, 1887. (Tr., p. 245.)

He finds, however, that in the paper signed by Governor Mendoza October 26, 1743, and according to the law then in force, that the grant was only effective as to the cultivated lands, but as to the pastures, entrances, exits and waters, the grant was a mere usufruct to be enjoyed in common. The estimated area was 50,000 acres. (Tr., p. 245.)

He finds that the governor had no power to grant the fee of pasture lands inclosed in the boundaries specified in the grant, which must be held void except as to the lands actually cultivated and occupied; that the particular boundaries and actual area of the cultivated lands were not shown with any definiteness by the testimony, and he therefore recommended the confirmation of the grant to the extent of said cultivated lands only, the area and boundaries of which could only be ascertained and actually determined by a survey. (Tr., p. 245.)

It was admitted, as stated in the foregoing opinion of the

surveyor general, that the grant papers showing the original grant were never in the public archives of the surveyor general's office of New Mexico, or filed in any other public office, or placed in any other public record in the Territory of New Mexico, but were retained in the private possession of the persons claiming to own the same until filed with said petition in the surveyor general's office April 11, 1887; but there were in the Spanish archives in the office of the surveyor general a number of other papers tending to show the existence of the grant.

The surveyor general reported said claim to the commissioner of the general land office, and on June 9, 1890, said surveyor general transmitted to the commissioner of the general land office a letter stating that there should be reserved from entry, by reason of the Nicholas Duran de Chaves grant, No. 155, all of the surveyed lands in township No. 5 N., R. 2 E., in New Mexico, comprising section 6 and fractional sections 4, 5, 7 and 8; also the surveyed lands of township No. 6 N., R. 2 E., New Mexico, comprising sections 30 and 31, and fractional sections 19, 20, 21, 28, 29 and 32; that the aforesaid comprised substantially the cultivated and occupied lands pertaining to said grant. (Tr., p. 245.)

This is followed by letter of the commissioner of the general land office acknowledging receipt, and suggesting:

"As this claim has been reported upon favorably by your office under the 8th section of the act of Congress approved July 22, 1854, the lands contained within the limits as approved should be reported to the register and receiver of the district in which the land is situated, with any necessary information, as that they may withdraw from entry all of the land contained therein."

On August 23, 1893, said grant having been presented to the United States Court of Private Land Claims, it ren-

dered a judgment. (Tr., pp. 247–250, inclusive.) It confirms a portion of the grant and fixes the boundaries, the estimated acreage being about 50,000 acres. Subsequently a survey was made under the decree of the Court of Private Land Claims, and this survey was confirmed in May, 1895, by said court. (Tr., p. 252.)

Prior to this survey and confirmation, it would not have been possible for any person to have ascertained or determined where the right of way entered and left the lands covered by said Spanish grant. The location of the northern boundary line, which is crossed by the right of way, both in going into the grant and in coming out, was always a matter of dispute between the parties claiming this grant, and the parties owning the grant lying to the north. (Tr., p. 252.)

The point where the right of way crosses the northern line of this grant going west is about twelve miles distant from the Rio Grande Valley, where the settlements upon this grant were, and that portion of the lands of the grant covered by the right of way was and is, and always has been, a sandy desert tract of high tableland, uninhabited and unoccupied. (Tr., p. 252.)

From the foregoing, and particularly from the confirmation of Governor Mendoza in 1743, it is apparent that this alleged Spanish grant was simply to a great extent a grant of the usufruct or rather a permission or license for grazing purposes, not to the exclusion, however, of others, but a right to be exercised in common. It can hardly be supposed that the government intended to grant for the exclusive use of a single individual a tract of land embracing over fifty thousand acres. This was the opinion of Surveyor General Julian. (Tr., pp.

243–247.) See, also, *Zia, Pueblo of,* v. *U. S.*, 168 U. S., 198 and 206.

The railroad was not located over the cultivated part of this grant, but at quite a distance therefrom. It was over that portion used merely for grazing purposes and to which the owners of the alleged grant had not an exclusive right or title. The former government would have had the power and the right to have granted a right of way over such lands.

Moreover, the description in the document signed by the alcalde, which was the important document in which were to be fixed the boundaries segregating the grant from other grants and from the public domain, is so uncertain and indefinite that it would be impossible to determine the actual boundaries. The southern boundary, which is fixed as the "San Pablo ponds," and the northern boundary as "a little pond grown up with rushes" between two houses, affords no boundaries or enclosing lines. The northern boundary is simply designated as a point and not a line. The description is essentially lacking in corners or enclosing lines.

Under the decisions heretofore referred to in discussing the first grant, this description did not have the effect of segregating the alleged grant from the public domain.

Two and one-fourth miles within this grant were therefore exempt from taxation.

ANTONIO SEDILLO OR CANADA DE LOS APACHES GRANT.

The right of way going west on crossing the west line of the San Clemente grant crosses a small piece of public land and then crosses in a northwesterly direction the south and west lines of an alleged Spanish grant as subsequently

confirmed and known as the Antonio Sedillo or Canada de los Apaches grant. The right of way within the exterior limits of this grant, as subsequently confirmed, is thirteen miles.

A petition was filed in the office of the surveyor general of New Mexico, April 6, 1871. On November 6, 1871, the surveyor general reported to the interior department approving the grant. In April, 1872, the report of the surveyor general was transmitted to Congress, and on October 11, 1886, a supplemental report was made by the then surveyor general, recommending the rejection of the claim. On November 24th of that year this report was transmitted by the surveyor general to the commissioner of the general land office. In September, 1877, a preliminary survey was made under the direction of the surveyer general, which shows the grant, except as to the north boundary, just as subsequently confirmed by the land court. On December 6, 1887, the supplemental report of the surveyor general recommending the rejection of the claim was transmitted to Congress. (Tr., pp. 252, 253.)

The grant papers are as follows:

A petition in 1769 of Antonio Sedillo to the governor, stating that during a former governorship he and his neighbors presented a petition asking a grant of lands called "Los Quelties," which was granted and given to them and which they inhabited for four years, and that it was then three years since the same was abandoned on account of the great risk on the frontier. He therefore applied to the governor to concede to him a tract of land which at the end of the aforementioned grant he had registered, and which was called La Canada de los Apaches. "Its boundaries on the east is a hill called Serro Colorado,

which is the boundary of those of Atrisco; on the west the point of a tableland, which runs in said direction, and which comes out of the said Canada; on the north the grant of the settlers of Rio Puerco; on the south the boundary of Mateo Pino; * * * and *if at any time the said place should become settled, I shall put no obstacle to their enjoying it*, if they do not prejudice me in the possession of my part, * * * which I claim on account of having no land of my own where to maintain my large family," etc.

This is followed by a document signed by Governor Pedro Fermin de Mendinueta (see Tr., p. 254), which states that at Santa Fe on April 20, 1769, the above petition was presented by petitioner, and in consideration of his services and other reasons set forth, the said governor concedes as a grant to Antonio Sedillo the tract of land he asks for, with the boundaries he mentions, "and under the conditions in his petition contained, and also that he settle the tract in the terms and forms prescribed by the royal laws; and further that he do not sell the same to any ecclesiastical party, and without prejudice to any third party having a better right." He then directs Carlos Mirabal to proceed, after summoning adjoining settlers, and if no contradiction is raised by a legitimate party, to put said Sedillo in possession, making a duplicate of the whole and deliver to said Sedillo, that it may serve him as a title, *and return the originals, that they may be filed where they belong.* (Tr., p. 254.)

This is followed by a document signed by Carlos Mirabal, reciting that on April 25, 1769, said Sedillo appeared with grant of lands given by said governor, and said Mirabal proceeded to the tract mentioned, accompanied by two witnesses, to give royal possession, summoning the adjoining settlers of Atrisco, as well as those of Rio Puerco,

who saw the petition and decree, and that he gave possession of the lands as follows: "With its boundaries on the east the Puerco river, on the west the point of tableland which runs in the said direction and which comes out of said Canada de los Apaches, on the north the grant of the Rio Puerco, on the south the boundary of Mateo Pino." (Tr., marg. p. 432.)

On June 13, 1892, claimants of this grant filed their petition in the the Court of Private Land Claims. (Tr., p. 255.)

In this petition it is shown that according to the survey made by the surveyor general in 1877, the alleged grant contained eighty-eight thousand and seventy-nine and seventy-eight hundredths acres, and this survey is claimed to be incorrect, because the *mesa* which comes out of the Canada de los Apaches, and which is the western boundary, is left entirely outside of the grant by the surveyor. It also states that there is no one in possession claiming adversely, with the exception of the Atlantic and Pacific Railroad Company, which claims a portion of the land north of said survey and west of the surveyed claims of said Rio Puerco grant, and petitioner expresses a willingness that so much of said lands as is claimed by said railroad company, the same being the alternate odd numbered sections of said survey, may be excepted from the confirmation prayed for.

On December 17, 1892, the grant was confirmed by the Court of Private Land Claims. (Tr., p. 257.)

The confirmation is based upon the provisions of the royal order of the King of Spain of October 15, 1754. It fixes the boundaries and specifies the area at eighty-eight thousand and seventy-nine and seventy-eight hundredths

acres, according to the survey made in 1877. It is also provided in the judgment that the station grounds and right of way, two hundred feet in width, of the Atlantic and Pacific Railroad Company through said alleged grant, be excepted from the operation of the confimation. The survey of said grant made under said decision has not yet been approved. (Tr., p. 258.)

Where the right of way crosses this grant at the time of its location and ever since the lands were unenclosed, uncultivated and unoccupied, consisting entirely of high desert lands, with nothing to distinguish the lands of the grant from public lands of the United States. Except, as aforesaid, there has been no segregation of this grant from the public domain. (Tr., p. 259.)

That prior to the determination by the Court of Private Land Claims it would not have been possible to locate the exterior lines of said grant, except as the preliminary survey may have shown them. (Tr., p. 259.)

Neither the Atlantic and Pacific Railroad Company nor its receivers or assigns have acquired by purchase or condemnation any portion of the right of way over the lands contained in said grant. When the claim for this grant was pending before the Court of Private Land Claims, the Atlantic and Pacific Railroad Company was a party to it, and in its answer claimed, among other things, the ownership of this right of way by virtue of section 2 of the act of Congress approved July 27, 1866. (Tr., p. 259.)

Under the decree entered in this case, to which the United States was a party, as well as the grant owner, although made by consent, it is clear, as adjudicated in that case, that the title of the Atlantic and Pacific Rail-

road Company to its right of way through this grant was obtained under section 2 of the Atlantic and Pacific Railroad Act of Congress, and is superior to the Spanish grant. It is an adjudication as between all the parties interested.

The title was moreover imperfect and incomplete within the ruling of this court in *Chaves* v. *United States*, 168 U. S., 177 and 188, and Mirabal, who put the alleged grantee in possession does not appear to have been an officer having authority to do so.

Again, it is no doubt true that this alleged grant of over eighty-eight thousand acres to one individual was not intended to convey the fee simple title, but was a grant, as in many other cases, of a right to pasture and for the roaming of cattle, a right to be exercised in common with others; in which case the government retained the power of disposition for other purposes, and concerning which the grant of a right of way would not be inconsistent or detrimental thereto.

Again, the lands, owing to the indefiniteness of the description in the alleged grant, were never segregated from the public domain until surveyed by this government in 1877. Until that date such lands must be regarded as still being considered as a part of the public domain so far as section 2 of the Atlantic and Pacific act was concerned.

Thirteen miles of the right of way through this alleged grant were, therefore, exempt from taxation.

LAGUNA INDIAN PUEBLO TRACTS.

Upon leaving the west line of the foregoing grant the right of way of the railroad crosses the public domain for a distance of about eight miles and then enters the lands known as the Laguna Indian Pueblo Tracts, crossing a portion of these tracts in a northwesterly course, and after passing through the Pueblo of Laguna and across public lands it again crosses another of these tracts. The entire distance of the right of way crossing these tracts is about seven miles. The tracts in question were not claimed as a Pueblo grant, but under purchase from private individuals. They are known as the Palmate Rancho, adjoining Cebolleta, El Rito Rancho, Gigante Canon, San Juan Rancho and Santa Ana Rancho.

Prior to 1859 a claim for these tracts was presented to the surveyor general of New Mexico, and transmitted with his approval to the commissioner of the general land office, and by such commissioner to Congress. The claim was confirmed by act of Congress June 21, 1860, but the first survey made thereunder was made in 1877, which survey was approved in June, 1877, and on September 22, 1884, a patent was issued.

The character of the country covered by this grant is the same as that covered by the other grants, except that at the time of the location of the right of way there were small tracts cultivated by the Indians in this grant, but no inclosed land. The right of way passed through some of these small cultivated tracts, but the exterior boundaries were never determined or segregated until the survey made in 1877. (Tr., p. 259.)

The grant as presented to Congress did not show any

original grant from the governor of the territory or anyone having authority.

Grant No. 1 appears from documents in substance as follows:

A certificate of Manuel Aragon, chief justice and war captain of the Pueblos of Acoma, Laguna, etc., stating that in view of his resignation he was requested to leave a statement of the government and orders given by the governors of the province, to see if by this means the pueblo could be relieved from the disorders and grievances suffered in the changes of justices and ministers; that in compliance with this demand, he executed this declaratory statement, stating that being present at the general visit made to this pueblo by Governors Chacon, Alencaster, Maynes and Manriques, authorizing these Indians to extend their fields beyond the league granted to them by the king as far as they could plant, for the actual support and maintenance of their families. The pueblo being situated in such a locality as not to afford them a sufficient quantity of arable land within the league allowed them by the king, and this pueblo having formerly suffered this scarcity of land for cultivation when this province was governed by Cachupin, these Indians purchased the rancho called Pagnati, situated to the north and adjoining the site of Ceballeta, distant three leagues from this pueblo. This rancho was formerly granted to Pasqual Pagarito, Vicente Pagarito, Antonio Pagnati and Miguel Magnino, and having possessed it for thirty years they sold it to the pueblo; and certain citizens having petitioned and asked for permission to settle there they have not been allowed to do so by the superior government, as it was a purchase made by the Indians, who held a deed authorized by the former justice of the peace of this pueblo; that in regard to the land towards the east,

they have been allowed to plant on the rancho known as El Rito, and therefore also the Gigante Canon to the ajo del Chamiso, together with the rancho commonly called San Juan, for pasture lands for their animals, the frontier being so much exposed that they cannot risk them in any other direction. On the west they have the site known as Cubero, where they have fields under cultivation and an acequia of their own, and they irrigate with the same water that passes through this pueblo; and in the same westerly direction, distant a mile from said pueblo, in the rancho called Santa Ana, where they hold lands for cultivation *in common;* as far as the alcalde is concerned who is to reside in this pueblo, he is forbidden by superior orders from availing himself of the labor of the Indians, etc.

This document is dated March 25, 1813, and is endorsed:

"Santa Fe, August 28, 1826.

Approved so far as this government is concerned, and legal and formal in its contents.

NARABONA."

Marginal notes:

"This document is to remain in the hands of Don Juan Miguel Casique, and at his death in those of his two daughters, Catrina and Josefa, who have the same right and interest in the site, together with Don Vicente Romero, included in the same interest.

(RUBRIC.)"

"The site of Cubero, mentioned in this document, and the water running through it, is the only water these Indians have the use of, as this proceeds from the Gallo Spring; therefore if the said spring is settled these poor Indians would perish, as it is the same water that reaches to the pueblo, and these Indians are entitled to it, being old settlers in good faith for more than one hundred years.

(RUBRIC.)"

Grant No. 2 appears from documents as follows:

A document signed by one Ensebio Aragon, whose only

title appears to be that of protector of the Indians, stating that in the year 1820 Vergara, protector general of the Indians of the province of New Mexico, executed a document alike to the instrument authorized by Don Antonio Sedillo in the year 1769; and for not stating three boundaries which said protector did not mention in his document, the parties mentioned in said document requested him to make a copy thereof, stating the boundaries to which the rancho of Pagnati is entitled, which document is of the following tenor:

For this pueblo of Jemes, on the first day of June, 1820, a document authorized by the former alcalde of the pueblo of Laguna was presented to him by Lorenzo and Alonzo Santiago, Alonzo the second, Torribio and Rita, native Indians of said pueblo, requesting him to take charge of the interests they represented in the rancho called Pagnasti, and having registered it, he finds that Sedillo, the said alcalde at that time, took cognizance of a suit brought by Juan Pagnasti and Pascual Pagarito, both residents of said pueblo, and it was ordered that each one should quietly remain upon his own property, without disturbing each other; that as protector of the Indians for the royal audience of Guadalajara, to whom alone it was proper for the Indians to refer matters of a common or private nature if they were in any way aggrieved, or if they had not a sufficient amount of land with that the law allows them, or that they may have legally acquired, and by virtue of the ancient possession of said land to which the said natives refer, called the rancho of Pagnasti, acquired by a legal title, and that the new settlement of Ceballeta, granted by Governor Don Fernando Chacon to certain citizens, and possession given by the Alcalde Don Jose Manuel Aragon, with the formalities required by the laws of possession and settle-

ment, the boundaries having been marked out. The aforesaid rancho and its boundaries in the direction of Ceballeta remained free with its ancient appurtenances, as far as the tableland of El Cabilan, on the south to La Cuesta, on the west to the Rito de San Jose, and on the east to the Canoncito del Cajo, etc., etc.

And it is said that there is no doubt in presenting themselves in person or through their protector to the Superior Audience they will be allowed to remain in peace, in the enjoyment of what is unquestionably theirs.

This document has the endorsement of the approval of Narabona, so far as the government is concerned, and according to the merit and formality in which it appears.

Then follows a certificate of Juan Garcia, a justice of of the peace, dated August 23, 1843, containing a statement of a sale made by one Baca for his father-in-law to the repsesentatives of the Pueblo of Laguna of all the arable lands in the rancho of El Rito. (Tr. pp. 263-264.)

Then follows a document containing the testimony of Jose Gonzales, before the surveyor general, to the effect that the Laguna Indians were in possession of the rancho Palmate since 1833, of the rancho El Rito since 1842; that the *Gigante Canon is used for pasture purposes in common by the people of Laguna and Ceballeta;* that they were in possession of the rancho San Juan since 1833, and of the rancho of Santa Ana since 1842, which *last appears also to be occupied by the Acoma Indians.* (Tr., pp. 265 and 261.)

Aragon swears that the *Gigante Canon is used by the whole neighborhood for pasture ground,* and he testifies to the possession by these Indians of the other ranchos since 1820. (Tr., p. 266.)

The surveyor general found that one of these tracts was acquired by the Indians by grant and purchase, and for the others they claimed a possessory title. (Tr., pp. 267–268.)

No title from the former governments was shown as to any of thse tracts, nor any record to show a grant, within the ruling of *United States* v. *Elder*, 177 U. S., 104.

They still remained therefore a part of the public domain of this government until segregated therefrom by the survey which it was necessary to make under the act of Congress confirming the title of the Indians. (*Stoneroad* v. *Stoneroad*, 158 U. S., 240; *Dent* v. *Emmeger*, 14 Wall., 313 and 314, and cases heretofore cited.) But long prior to the date of this survey the right of way had been located over these tracts and the title thereto had passed to the railroad company under the grant contained in the Atlantic and Pacific act.

This title was superior to that of the Indians as confirmed by Congress, inasmuch as the confirmation did not become effective to pass title until a survey thereunder had been made.

See

Le Doux v. *Black*, 18 How., 473 and 475.
Le Compte v. *United States*, 11 How., 115, 125 and 127.
Dent v. *Emmeger*, 14 Wall., 313.

Seven miles of the right of way over these tracts was therefore exempt from taxation.

LAGUNA PUEBLO.

After passing a portion of the grant last referred to, the right of way crosses for two Spanish leagues a grant subsequently confirmed by the Court of Private Land Claims, known as the Laguna Pueblo. It crosses this grant from east to west for a distanec of six and one-half miles. When the right of way was located and from that time since it passed around a hill on which the village of the Pueblo was and has since been located. (Tr., p. 268.)

The history of this grant is as follows:

On June 29, 1857, the Pueblo filed a petition in the office of the surveyor general of New Mexico, claiming a grant under a certain document alleged to have been executed by the governor general of the province in 1689. On November 22, 1872, after the location of the railroad right of way, the surveyor general gave a decision recommending confirmation of the alleged grant, and on November 22, 1872, transmitted the papers to the commissioner of the general land office, and on January 24, 1873, the papers were sent to Congress, but Congress never acted upon the same. In 1896, the same claim was filed in the Court of Private Land Claims at Santa Fe, and in September, 1897, the court rendered a decision confirming the grant in part and directing a survey to be made. (Tr., pp. 268–269.)

The court finds that in 1699 the ancestors of complainant, the Pueblo of Laguna, established a town now occupied by the Pueblo of Laguna, and the same has been from said year, 1699, continuously occupied by the mempers of the Pueblo. It finds that the Pueblo was entitled to four square leagues under the Spanish law, but certain

lands are excepted from the confirmation as the property of the United States.

The opinion shows that the alleged grant papers were not genuine, and claimant's title must be determined by the rules which the king of Spain laid down for the government of his representatives in New Mexico for their dealings with the Indians, and then refers to the record of certain proceedings in 1815 before the governor, between the Pueblo of Taos and certain persons, wherein he declared that the king had given to each Pueblo four square leagues of land measuring from the center of the village; that the land was given in entail, and that the Indians were incapable of alienating. (Tr., pp. 271 and 274.)

The survey of the grant was confirmed by the court on August 22, 1899. In the claim filed in the surveyor general's office on June 29, 1857, the west line as claimed by the Indians of the grant to their Pueblo was about two Spanish leagues farther to the west than the west line fixed by the court. (Tr., p. 273.)

The right of way crosses over about two Spanish leagues of public land and then again crosses from east to west the lands heretofore referred to as the Laguna Indian Pueblo tracts. (Tr., p. 273.)

The general characteristics of the country crossed by the right of way in passing from the east line of the Laguna Indian Pueblo tracts to the final west line of the same tracts is the same as heretofore described, with the exception that in several places small portions of land included within each of the grants last referred to as crossed by the right of way were long prior to the location of said line, and ever since said date have been, cultivated, though not enclosed, by the Indians of Laguna. Tr., p. 273.)

No segregation, except as above stated, of the land of this grant from the remainder of the public domain was ever made until the decision of the court referred to, and until that decision it would have been impossible to have located the same. (Tr., p. 273.)

So far as the lands of the Pueblo are concerned, the former governments retained the fee and the right of disposition except where there has been an individual allotment duly confirmed. This government, therefore, possessed the same right. The alleged grants were to the community in general, or rather this was the result from the operation of law, no special grant being made, and the title and power of disposition of outlying lands used in common by the inhabitants, and of all lands within the Pueblo not owned by individuals, was in the king or sovereignty. Therefore, in *United States* v. *Santa Fe*, 165 U. S., 675, on page 709, it is said:

"Moreover, the general theory of the Spanish law on the subject indicates, that even after a formal designation, the control of the outlying lands, to which a town might have been considered entitled, was in the king, as the source and fountain of title, and could be disposed of at will by him or by his duly authorized representatives, as long as such lands were not affected by individual and private rights. This is shown by the quotation from Elizondo, already made. The provisions of law 14, title 12, book 4, of the Recoppilacion (2 White, New Recop., p. 52), which is reproduced in the margin, illustrates the absolute control thus exercised by the king of Spain over the subject."

See, also, page 710, in which it appears that a like power was exercised by Mexico.

To these rights the United States succeeded as the successor of the king of Spain and the government of Mexico. (See page 711.)

In *United States* v. *Sandoval*, 167 U. S., 278, on page 297, it is said:

"Under the laws of the Indies, lands not actually allotted to settlers remained the property of the king, to be disposed of by him or by those on whom he might confer that power. As Mr. Hall says (Chap. VII, 122): 'The fee of the lands embraced within the limits of pueblos continued to remain in the sovereign, and never in the pueblo as a corporate body.' Subsequent decrees, orders and laws did not change the principle."

See, also,

Hayes v. *United States*, 170 U. S., 654.

It would seem also from the foregoing authorities that the Spanish law did not *proprio vigore* confer upon every town or pueblo a grant of four square leagues of land.

It is therefore manifest that over the lands of this pueblo not held in private ownership, and the record discloses no such case, this government had the right and power to grant a right of way to the railroad company. Such lands remained a part of the public domain of this government until Congress should choose to part with the title.

Six and one-half miles of right of way over this alleged grant were therefore exempt from taxation.

Acoma Pueblo.

The right of way, after crossing the west line of the last Indian pueblo tracts, crosses over lands contained in an alleged Spanish grant known as the Acoma Pueblo. The land over which the right of way crosses in this grant is of the same general character as those contained in the other grants, and the Indian pueblo of this grant is out of sight from any point of the right of way. There was some

small acreage cultivated by the Indians, but not enclosed, over which the right of way was located. The right of way over this grant is twelve and one quarter miles in length. (Tr., p. 274.)

An application for this alleged grant was filed in the office of the surveyor general of New Mexico, March 3, 1856, and such application with the recommendation of the surveyor general was transmitted to the commissioner of the general land office September 30, 1856, and was confirmed by Congress December 22, 1858. (Tr., p. 274.)

The survey of this pueblo was first made under the act of Congress in March, 1877, long after the location of the right of way, and on June 5, 1877, it was approved, and on November 19, 1877, a patent was issued; that until this survey was made no one could have located the exterior lines of this grant accurately. (Tr., p. 276.)

The grant appears to be based upon a document made September 28, 1689, by the governor of New Mexico, which purports to set forth the testimony of an Indian as to the alleged boundaries of the pueblo, and another document made in 1689 by the same governor, setting forth the testimony of the same Indian concerning the pueblos of Laguna and Acoma. (Tr., pp. 274–277.)

It is clear that in respect to this grant the same remained a part of the public domain until the title of this government was divested. This was not effected until the survey was made, as required by the act of Congress, confirming the title to the pueblo. While Congress had undoubtedly the right to dispose of the title of the government and grant it to the pueblo, such title did not attach or become distinctly identified until a regular survey had been made. Such survey was absolutely essential to fix

the boundaries of the grant as confirmed by Congress. (*Stoneroad* v. *Stoneroad*, 158 U. S., 240; *Dents* v. *Emmeger*, 14 Wall., 313, and cases heretofore cited.) Before such survey its boundaries could not be identified. (Tr., p. 277.) The description given in the testimony is simply that of a locality in general over which they roamed and part of which they used.

Twelve and one-fourth miles of the right of way over this pueblo were therefore exempt from taxation.

None of the right of way of the Atlantic and Pacific Railroad Company in Valencia County was acquired by purchase or condemnation proceedings, or by the payment of any compensation therefor to anyone. The claim of the company that its location of the right of way in Valencia County was over government land was never objected to by the government of the United States, the Territory of New Mexico, the County of Valencia, or the owners of any of these alleged Spanish grants. (Tr., p. 286.) When the definite location of the right of way was made through Valencia County, everyone supposed that it was over public land of the United States. This claim, maintained for twenty-five years by the railroad company, and acquiesced in by everyone else, including the officials of Valencia County and the territory, clearly prohibited the territory or any of its officers, or the County of Valencia, from saying, as was said in these "additional assessments," that some portion of this right of way was acquired from private ownership.

SIXTH POINT.

A glance at the judgment rendered by the Supreme Court of the territory (Tr., p. 314) discloses the straits that the learned court below was placed in in affirming the jugdment of the District Court. This judgment provides that the territory recover against the present owner of the property formerly owned by the Atlantic and Pacific Railroad Company the sum of sixty-one thousand nine hundred and twenty-two dollars and seventy-three cents ($61,922.73), with interest from the 5th day of October, 1899, and costs, although it was not being pretended or claimed that the Santa Fe Pacific Railroad Company, the owner of the property, was before the court, such judgment clearly shows that it was a judgment rendered without jurisdiction of the person or property sought to be affected.

All of which is respectfully submitted.

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Solicitor for Appellants.

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Of Counsel.

APPENDIX.

Copies of all statutes of New Mexico in force in 1897 which have any bearing on the questions involved.

Section 1. There is hereby established a fiscal year which shall begin on the first Monday of March of each and every year, and end on the first Monday of March next ensuing.

The fiscal year beginning on the first Monday of March, A. D. 1889, shall be the fortieth fiscal year, and thereafter the fiscal year shall be numbered in order of succession. (Ch. 32, Laws of New Mexico of 1889.)

Compiled Law of New Mexico, 1884.

Sec. 2807. The terms mentioned in this section are employed throughout this chapter in the sense herein defined:

First. The term "real estate" includes all lands within the territory to which title or right to title has been acquired; all mines, minerals and quarries in and under the land, and all rights and privileges appertaining thereto, and improvements.

Second. The term "improvements" includes all buildings, structures, fixtures and fences erected upon or affixed to land, whether title has been acquired to said land or not.

Third. The term "personal property" includes everything which is subject of ownership, not included within the term "real estate."

Fourth. The term "credit" includes every claim and demand for money or other valuable thing, and every annuity or sums of money receivable at stated periods; but pensions from the United States, and salaries, or payments expected for services to be rendered, are not included in the above term.

Sec. 2816. All taxable property shall be listed, assessed

and taxed each year in the name of the owner thereof on the first day of March.

Sec. 2822. The assessor is required, between the first day in March and the first day in May of each year to ascertain the names of all taxable inhabitants, and all property in his county subject to taxation. To this end he shall visit each precinct in the county and exact from each person a statement in writing, or list showing separately:

First. All property belonging to, claimed by or in the possession of under the control or management of such person, or any firm of which such person is a member, or any corporation of which such person is president, secretary, cashier or managing agent.

Second. The county in which such property is situated or in which it is liable to taxation.

Third. A description by legal subdivisions or otherwise sufficient to identify it, of all real estate of such person and a detailed statement of his personal property, including average value of merchandise for the year ending March 1st; amount of capital employed in manufactures; number of horses, mules, cattle, sheep, swine and other animals; of carriages and vehicles of every description; jewelry, gold and silver plate; musical instruments; household furniture; moneys and credits; shares of stock of any corporation or company; and all other property not herein enumerated, with the value of the different classes of property in detail.

Sec. 2826. If any person liable to taxation shall knowingly make a false list of his property subject to taxation in this territory for the purpose of avoiding any proper assessment of taxes, he shall be liable to a penalty of twenty-five per cent., to be added to the amount of the taxes assessed upon the true amount and value of his property, and shall also be deemed guilty of perjury.

Sec. 2834. On or before the first Monday in March, annually, the assessor shall make out an assessment book or roll, with appropriate headings, alphabetically arranged, in which must be listed all the property in the county subject to taxation. Such book shall contain the names of the persons to whom the property is assessed, with the several species of property and the value as here-

inbefore indicated, with the columns of numbers and values as given by the person making the return, as fixed by the assessor, and as decided by the county commissioners. At the end of such book or roll, all property assessed to "unknown owners" shall be entered.

Sec. 2835. Each tract of land shall be valued and assessed separately, except when one or more adjoining tracts are returned by the same person, in which case they may be valued and assessed together.

Sec. 2836. The assessor must take and subscribe an oath, to be certified by the officer administering it, and attached to the assessment book, to be substantially as follows:

"I....., assessor of the county of ....., Territory of New Mexico, do solemnly swear that during the whole time allowed by law to make this assessment I have made diligent inquiry and examination to ascertain all the property within said county subject to taxation, and that I have assessed it on the assessment book equally and uniformly to the best of my judgment, information and belief, at its full cash value; and that I have faithfully complied with all the duties imposed upon the assessor by the revenue laws of the territory; and that I have not imposed any unjust assessment, through malice or ill will, nor allowed anyone to escape a just and equal assessment, through favor or reward."

Compiled Laws of New Mexico, 1897.

Sec. 4048. The county commissioners of each county shall constitute a board of equalization for the revision, correction and completion of the assessment rolls. Such board shall hold two regular meetings for this purpose, in each year, at the court house, commencing on the first Monday of June and July. It shall, at its first meeting, have power to supply omissions in the assessment rolls, and, for the purpose of equalizing the same, may increase, diminish or otherwise alter and correct any assessment or valuation, except where such valuation is fixed by law. In case any material changes are made by the board in

the assessment of any person, company or corporation, the clerk shall immediately notify such person, company or corporation, by mail, or otherwise, of the fact, and nature of the change. At either of said meetings, said board shall hear appeals and complaints of those dissatisfied with the assessment by the assessor, and shall decide the same, as in their judgment is proper and right. Any person, company or corporation dissatisfied with the decision of said board may appeal therefrom to the territorial board of equalization, as constituted by and under section two thousand six hundred and thirty-four, by filing a written notice of appeal in the office of the clerk of said county board of equalization, within five days after the rendering of the decision of said board, which said notice of appeal shall state in plain and concise language the grounds upon which said appeal is made. The said clerk shall, within two days after the filing of said notice of appeal, and upon the payment by appellant to said clerk of one dollar, as an official fee for his services, certify in writing to the said territorial board of equalization all proceedings had before said county board, in the matter of said assessment so appealed from, as well as said notice of appeal. The said territorial board of equalization, who are hereby invested with full power to act in the premises, either in increasing, diminishing, exempting, or otherwise altering and correcting any assessment or valuation so appealed from, except valuations fixed by law, shall, on or before the second Monday of August, in each year, and at such time and place as they may designate, hear and determine said appeal, and decide the same, as in their judgment may be right and proper, and the decision of said territorial board of equalization shall be conclusive and final. (Chap. 73, Laws 1887.)

Sec. 1. The governor shall appoint, with the consent and confirmation of the council, one taxpayer from each of the five judicial districts, to constitute the territorial board of equalization; such taxpayers to represent and be of different leading industries of the territory. Such board shall not have more than three representatives of either of the great political parties.

Sec. 2636. Said board shall meet annually on the second Monday of September, at the capitol, as a board

of equalization and appeal only. It shall be the duty of the auditor of the territory at such meeting to furnish said board with the assessment roll of each county of the territory for their inspection and examination, for the purpose of ascertaining the rate of assessment and valuation of property therein, and whenever they are satisfied that the scale of valuation has not been made with reasonable uniformity by the different county assessors, the said board shall adjust and equalize the said assessment rolls by raising or lowering the valuation thereof so that the same shall be of uniform value throughout the territory. Such board, at this meeting, shall have power to hear and determine any appeals taken, as now provided by law, and also any appeals taken by the territory, or any county, which appeals are hereby authorized to be made and taken in the same manner as other appeals from assessments for taxation are now allowed, and it shall be the duty of the solicitor general of the territory to take an appeal from any action of the board of county commissioners on behalf of the territory and the county whenever he shall be requested so to do, by a petition in writing signed by three responsible taxpayers of any county, together with an affidavit signed by at least one of them, showing the grounds for such an appeal, and upon the payment by them of the fee now required by law. Any clerk of the board of county commissioners failing or refusing to send to the secretary of the board of equalization a complete transcript in appeal cases, as now provided by law, within thirty days from the time notice of appeal is filed with said clerk, shall be guilty of a misdemeanor, and on conviction in the District Court shall be fined in a sum not exceeeding one hundred dollars. (Section ——, chapter 12, Laws of New Mexico of 1897, February 17, 1897.)

COMPILED LAWS OF NEW MEXICO, 1884.

Sec. 2839. The board of county commissioners at their June session, or at any special session subsequent thereto, and prior to the first day of September, shall make an order approving the assessment roll as revised and corrected by the board, and levying the taxes for the

year, for territorial, county and school purposes, as provided by law; which order shall be entered of record in their proceedings, and endorsed upon the assessment roll under the seal of said board, and the hand of the clerk thereof.

Sec. 2842. On or before the third Monday in August each year the territorial auditor shall transmit to the clerk of each county a statement of the changes, if any, which have been made by the board of equalization in the assessment, and the clerk upon receiving such statement shall note such changes upon the assessment rolls in a separate column.

Sec. 2843. As soon as practicable after the taxes are levied, the clerk shall make out a tax list in alphabetical order, having columns for names of owners; description and value of real estate; value of personal property; amount of each different kind of tax; total amount of tax; delinquent poll tax and remarks.

Sec. 2844. An entry shall be made upon the tax list showing what it is, and for what county and year it is, and the clerk of the board shall attach to the list a copy of the order levying the tax, and his warrant, under his hand and the seal of the board, requiring the collector to collect the taxes therein levied according to law, and no informality in complying with any of the foregoing requirements shall render any proceedings for the collection of the taxes invalid.

Sec. 2845. The clerk of the board shall deliver the tax list to the collector of the county by the first day of August, or as soon thereafter as may be practicable, and shall take his receipt therefor; and such list and warrant shall be full and sufficient authority for the collector to collect all taxes specified therein, and shall be his justification against any illegality in the proceedings prior to his receiving the list. (Sections 2842, 2843, 2844 and 2845 of the Compiled Laws of New Mexico of 1884.)

Sec. 2847. If by any means any property shall be omitted in the assessment of any year or series of years, and not put upon the assessor's book, the same when discovered shall be listed by the assessor and placed upon his roll before the same is returned to the board of county commissioners, with all arrearages of taxes which should have been

assessed and paid in former years charged thereon, or in case of failure of the assessor the same shall be assessed by the collector in the manner provided in the next section.

Sec. 2848. When the collector of any county, after the tax list has been delivered to him, ascertains that any real estate, or any personal property then in his county, are omitted from the tax list, and has reason to believe that such personal property has not been taxed in any other county for that year, he shall forthwith proceed to list, value and assess such property in the same manner that the assessor might have done, and shall enter such assessment in his tax list following the entries made by the clerk (and such entries shall be designated as "additional assessments"), and the taxes so assessed by the collector shall be as valid for all purposes as if the assessment had been regularly made in the manner hereinbefore provided. But the person so assessed shall have the right of appeal to the board of county commissioners for a correction or abatement of such assessment, or refunding any part of the tax erroneously assessed, if paid by him.

Sec. 2849. Every tax levied according to the provisions of this act shall have the force and effect of a judgment against the person assessed, and taxes upon real estate are hereby made a lien thereon from the date of the levy thereof, and taxes due from any person upon personal property shall not be satisfied nor the lien removed until the taxes are abated or paid, or the property sold for the payment thereof. The tax list and warrants hereinbefore provided for shall have the force and effect of an execution against the person or property assessed.

Sec. 2850. On delivering the tax list and warrant to the collector the clerk must charge the collector with the full amount of the taxes levied, and if the delinquent tax list is transferred from one collector to another the clerk must credit the one and charge the other with the amount then outstanding on the tax list. All such amounts shall remain a charge against the collector until collected and accounted for or abated by the county commissioners.

Sec. 4061. One-half of the taxes upon real estate shall, as between vendor and purchaser, become a lien upon such real estate on and after the first day of January in each year, and the other half on and after the first day of July in each year. (Chap. 61, Laws 1893.)

Sec. 4062. No personal demand for taxes shall be necessary, but it is the duty of every person subject to taxation to call upon the county collector between the 1st day of August and the 1st day of January following, and pay half his taxes, and to call upon the county collector between the 1st day of August and the 1st day of July in the following year and pay the other half of his taxes; and if any person shall fail or neglect to pay his taxes as hereinabove provided until after the 1st days of January and July following the levy thereof, the collector shall proceed to make the same by distraint and sale of his personal property, and the tax list shall be sufficient warrant for such distraint. It is, however, the duty of the collector to visit each precinct in his county to receive the taxes, first giving ten days' notice of the time and place appointed by him, by hand bills posted in at least three public places in the precinct. He shall give such notice immediately after receiving the tax lists: *Provided*, That when the collector negligently or willfully fails or refuses to collect any of such taxes, or to make such distraint, he shall be liable on his bond for the full amount of such taxes so failed to be collected or distrained for, together with interest at twelve per cent.

Sec. 4066. On the 1st day of January in each year half of the unpaid taxes for the year last past, and on the 1st day of July in each year the remaining half of the unpaid taxes for the year last past, shall become delinquent and shall draw interest at the rate of twenty-five per cent. per annum, but the collector shall continue to receive payments of the same after the first day of January and July until the day of sale. (Chap. 61, Laws 1893.)

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Sec. 2883. Omissions, errors or defects in form in any assessment list or tax roll, when it can be ascertained therefrom what was intended, may be supplied or corrected by the assessor at any time before the return of the assessment roll to the collecter, or by the collector at any time after the receipt of such roll by him. When any omission, error or defect has been carried into a delinquent tax list, or any error appears in any publication, the list or publication may be amended by the collector and republished as amended; but such publication must be made in the same manner as the original publication and for not less than one week.

COMPILED LAWS OF NEW MEXICO, 1897.

Sec. 4157. Whenever, in his judgment, it may be proper, the attorney general, district or county attorney shall bring suit at law for the recovery of taxes which may be due from any person, or upon any property, where the amount exceeds one hundred dollars. Such suit shall be in the name of the territory, and shall be against the person assessed, except where the assessment is against unknown owners, in which case the suit shall be against the property which is liable for the tax. If the tax be a lien upon any real estate, the fact shall be stated in the declaration, together with a description of such real estate. The suit shall be for the full amount of territorial, county, school or license taxes then due and unpaid, whether by reason of one or more than one assessment. The judgment in such a case, if in favor of the territory, shall, in addition to other ordinary requisites, contain a description of the real estate, if any, upon which such taxes is a lien, and shall itself be a lien thereon, and shall contain an order for the sale thereof. The order of sale shall likewise contain a description of such real estate, and shall be directed to the sheriff of the county wherein such real estate is situate: *Provided*, That in such cases no ap-

praisement shall be required. The judgment rendered in such suit shall also have the effect of a general judgment against the person. When suit is brought under this section against real estate, process shall be served upon any person residing upon, or exercising authority over, the premises, if any there be, and by publication, as now required by law in the case of non-resident defendants, and such service shall bind all persons having interest in such real estate.

COMPILED LAWS OF NEW MEXICO, 1884.

Sec. 345. The board of county commissioners shall have power at any session:

* * * * *

Tenth. They shall also constitute boards of equalization of taxes and to hear appeals from the action of the assessors who make the assessments; they shall revise the lists of assessments within their respective counties, and shall correct the same, and shall hear and determine all appeals of assessments that may be brought before them, as required by law, and in no event shall the said commissioners levy any assessment of taxes exceeding one per cent.

* * * * *

Sec. 343. Said board of county commissioners shall meet at the county-seat of each county on the first Monday in January, April, July and October in each year, and at such other times as in the opinion of the board the public interests may require.